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**The dilemma of the democratic implementation of the two thirds gender rule in
the National Assembly: The Kenyan experience.**

Name: Sarah Kemunto Ombwori.



A Dissertation Submitted in Fulfilment of the Requirements of the Master of Laws (LLM)

Strathmore Law School

Strathmore University

Nairobi, Kenya.

November, 2020.

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Sarah Kemunto Ombwori

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Approval

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Abstract

In many Parliaments across Africa, the number of male representatives is higher than that of their female counterparts. The same is true for Kenya thereby prompting the women movement to advocate for the rights of women. This culminated in the inclusion of various articles on women's rights in the 2010 Constitution including Article 27(8) which provides for the two third gender rule and mandates Parliament to enact laws to actualise this provision. No law has been enacted since the promulgation of the 2010 Constitution to realise the gender rule. The Constitution also provides for the right to vote under the principle of universal suffrage in article 38(2). Citizens choose representatives that reflect their interests best. The elected representatives at the constituency level later come together to form the National Assembly. As the citizens are exercising their voting right under article 38(2) of the Constitution, the consequence is that the threshold set out in article 27(8) may not be achieved. This has been the situation since the promulgation of the 2010 Constitution.

It is upon this backdrop that this study sought to analyse the measures in place as well as the attempted measures to implement article 27(8) of the Constitution in the context of National Assembly, to interrogate whether the measures in place are compatible with the principle of universal suffrage as a component of democracy and whether the measures adopted by other jurisdictions are relevant to the Kenyan situation. The study applied both qualitative and quantitative research methods to collect data from the National Assembly of Kenya. Structured questionnaires with open and closed questions were used. The study also relied on secondary sources such as books and journals. The study established that there are two main Constitutional measures for the implementation of the two third gender rule. These include the reserved seat quotas where women compete against each other in the 47 counties and the direct nominations. The study found that the reserved seat quotas were compatible with the principle of universal suffrage whereas direct nominations were not. The study used South Africa and Namibia as comparative studies, because of the similar socio-cultural and economic environments as well as the fact they had both achieved high numbers of women representatives in the National Assembly. The comparative study revealed that a vibrant women movement is at the heart of realising gender parity. The study recommends the use of voluntary party quotas as part of the measures to realise the gender rule. Lastly, the study recommends more involvement and support by political parties in realising article 27(8).

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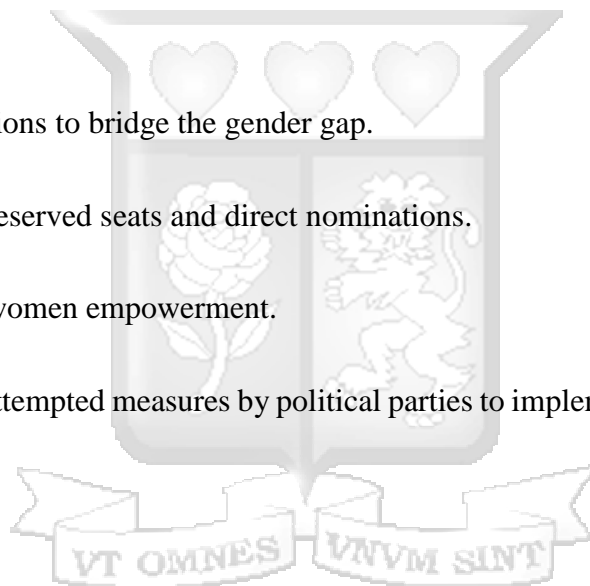
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Legal Instruments

Kenyan Legislation

The Constitution of Kenya, 2010.

The Draft Constitution of Kenya, 2004 (BOMAS draft).

The Political Parties Act, 2011.

The two third gender rule (Amendment) Bill, 2015.

Independent Electoral and Boundaries Commission Act, 2011.

Other jurisdictions

The Constitution of the Republic of Namibia.

International Instruments

UN Charter, 24 October 1945, Preamble.

UN Convention on the political rights of women, 1952.

UN Convention on the Elimination of All Forms of Discrimination against Women, 1981(CEDAW).

UN Beijing Declaration and Platform of Action, 27 October 1995.

UN Dakar African Platform for Action, 23 November 1994.

AU Solemn Declaration on gender equality in Africa, 2004.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (Maputo Protocol).

Abbreviations

AU- African Union.

ANC-African National Congress.

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women.

CIC - Commission on the Implementation of the Constitution.

CKRC - Constitution of Kenya Review Commission.

CMD - Centre for Multiparty Democracy.

CREAW - Centre for Rights Education & Awareness.

FEMNET - Africa Women's Development and Communication Network.

FIDA - International Federation of Women Lawyers.

IEBC - Independent Electoral & Boundaries Commission.

KEWOPA - Kenya Women Parliamentary Association.

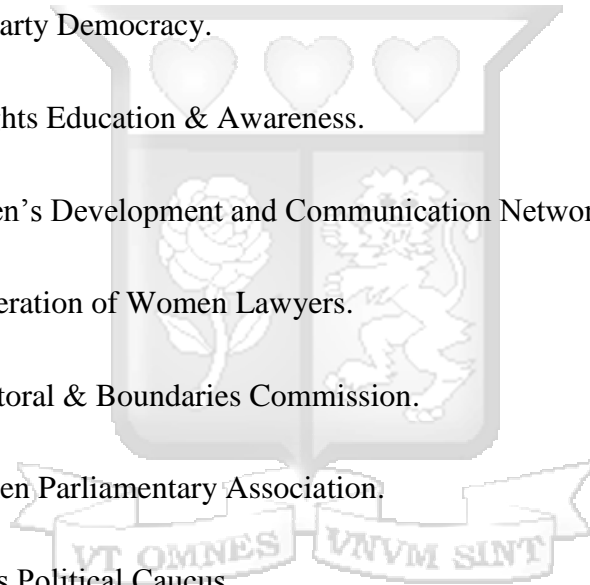
KWPC - Kenya Women's Political Caucus.

MP - Member of Parliament/National.

NCWK -National Council of Women of Kenya.

ODM-Orange Democratic.

UN-United Nations.



List of cases

Advisory opinion in the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR.

Centre for Rights Education & Awareness (CREAW) v Attorney General & Another [2015] eKLR.

Katiba Institute v Independent Electoral & Boundaries Commission [2017] eKLR.



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1.0.CHAPTER ONE: INTRODUCTION.

1.1.Background to the Study.

The National Assembly is the main legislative arm of the government concerned with national matters.¹ The study focused on the National Assembly mainly because it is the primary institution that is mandated to pass laws to realise the two thirds gender rule. Moreover, it has a long history of underrepresentation of women. Since independence, gender inequality has been prevalent in the National Assembly. For instance there were only three female representatives in the National Assembly following the 1983 and 1988 General elections. The trend remained the same with an increase in the number of women representatives after the introduction of the reserved seat quotas by the 2010 Constitution. The table below shows a trend of inequality in female representation in parliament since 1969.

Year	No. of male MPs	No. of female MPs	Total no. of MPs	% Women
1969	165	2	167	1.2%
1974	162	7	169	1.4%
1979	166	4	170	2.4%
1983	167	3	170	1.8%
1988	197	3	200	1.5%
1992	193	7	200	3.5%
1997	214	8	222	3.6%
2002	204	18	222	8.1%
2008	200	22	222	9.9%
2013	281	68	349	19.5% ²
2017	273	76	349	21.8% ³

Table 1 Women representation since 1969.

¹ Franceschi L, Lumumba P, *The Constitution of Kenya: A Commentary*, 2nd Edition, Strathmore University Press, Nairobi, 2019, 388.

² Report by Association of Media Women Kenya, *86 and Counting: Women Leaders in the 11th Parliament*, 31 March 2015.

³-< <http://www.parliament.go.ke/the-national-assembly/mps> > accessed on 31st May, 2020.

As a result of this inequality, the 2010 Constitution introduced the two-third gender rule under article 27(8) to enhance the numerical strength of women in leadership positions. However, for article 27(8) to be realised, there needs to be systems and policies in place that will in a way pre-determine the outcome of the election to the National Assembly. The current system of election in Kenya is guided by the principle of universal suffrage as a tenet of democracy and consequently cannot be pre-determined.

Democracy describes a system where the people's representatives are selected through elections that are competitive and where such elections are held regularly and under conditions of universal suffrage.⁴ The citizens expect the elected representatives to protect their interests, ideals and values. Part of the widely accepted values by advocates of democracy include: liberty, equality, fraternity & justice.⁵ These values have found their way into the Kenyan Constitution and thus it is important to highlight them as we define what democracy is, for the purposes of this study. For instance, Article 10(2) of the Constitution puts emphasis on the values of equality, democracy and the participation of the people. The study focused on the aspects of universal suffrage and competitive elections as key components of democracy. The Constitution at article 38(2) confers the citizens of Kenya with a system of election that is based on the principle of universal suffrage and the free manifestation of the will of the voters.

When the electorate vote for leaders, they vote based on their different interests and needs. Usually, there are several candidates that run for various elective seats. The candidates that are able to convince the people that they will represent their interests and ideals best are elected to the National Assembly. There are 290 constituencies in the country and in each constituency, the people vote based on their specific needs. Once the individual representatives are elected, they come together and form the National Assembly. While the citizens are voting for their leaders, they do not consider the structure of the National Assembly. The consequence of this is that the structure of the National Assembly is likely to violate the gender rule enshrined under article 27(8). The study limited itself to the above definition of democracy in light of the implementation of the gender rule.

⁴ Owen D, 'Democracy', in Bellamy R, Mason A (eds) *Political concepts*, Manchester University Press, Manchester, 2003, 107.

⁵ Springborg P, Karl Marx on democracy, participation, voting, and equality, 12(4), *Political Theory*, 1984, 537.

The study took cognisance of the fact that gender balance in legislatures has been a thorny issue not only in Africa, but also in the world over. Many authors agree that the female gender has not been adequately represented in legislatures. There have been some advancements made however, women still face a myriad of challenges in their quest to increase their numbers in the legislatures. To alleviate the barriers to the achievement of women representation in parliaments, many organisations, both international and local, have put measures in place and are working hard to change the narrative. For instance, defending and safeguarding the rights of women has remained central to the actions of the United Nations since its inception. The preamble of the UN Charter reiterates its faith in fundamental human rights for all gender.⁶ In 1952, the UN passed a binding convention that guaranteed the rights of the female gender in political involvement and representation.⁷ Despite all these efforts by the UN, women have continued to face discrimination. It is because of this that the UN introduced the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).⁸

The Convention is one of the most important human rights treaties for women and has been dubbed as the International Bill of Rights for women. In 1984, Kenya ratified the convention putting it under the responsibility to eradicate all types of discrimination against the female gender, especially in the political field. Like all member states, Kenya is obligated to put measures in place that guarantee the development and progress of women to enable them enjoy fundamental human rights, equal to men.⁹ This means that Kenya has a duty to support equality of all gender in political representation in line with the CEDAW regulations. In addition to CEDAW and to further women equality agenda, the UN organised four important world summits for women: Mexico City, 1975, Copenhagen, 1980, Nairobi, 1985 and Beijing, 1995.¹⁰ Among the four, the Beijing Conference put more emphasis on gender equality through affirmative action. In this context, affirmative action describes the actions and programmes that seek to achieve the elimination of barriers that have kept minorities and women out of opportunities in numerous sectors, for instance in the governmental and education sectors.¹¹

⁶ Preamble, UN Charter, 24 October, 1945, 1 UNTS XVI.

⁷ *Convention on the Political Rights of Women*, 1952, A/RES/640(VII).

⁸ *Convention on the Political Rights of Women*.

⁹ Article 3, *Convention on the Elimination of All Forms of Discrimination against Women*, A/RES/34/180.

¹⁰ UN Women, Conferences on Women, <https://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women> >- accessed on 24 June 2020.

¹¹ Smith J, Review: affirmative action, 27(2), *Howard Law Journal*, 1984, 496.

The Beijing Conference created a road map for women in Kenya to be more proactive in advocating for the course of implementing gender equality. For instance, it is after Beijing conference that two bills were tabled in parliament, seeking for affirmative action in women representation in parliament. It provided space for Kenyan women to advocate for full access to participation in power structures. This formed a background to the road to the promulgation of the Constitution. The Beijing platform imposed on states measures¹² to be taken in the electoral systems. This was aimed at encouraging the incorporation of the female gender by political parties in both elective and appointive public positions to bring them to the same level with men. States were also expected to review party structures in order to eliminate all obstacles hindering women participation.

Following the commitment to the UN framework, the African Union member states worked to promote gender parity in Africa. For instance, in 1994, the Dakar Platform for Action fostered the equality of women.¹³ In 1999, the AU in a bid to encourage the advancement of women adopted the African Plan of Action which would facilitate the implementation of the Dakar and Beijing Platform for Action.¹⁴ Kenya as one of the AU member states set up strategies to stimulate the equality of all gender in decision making institutions including parliament. As a result, the women movement has become more proactive in advocating for equality in political positions.

The Women's Movement in Kenya has its origins in the self-help groups which existed before independence. However, the first known formal organisation was Maendeleo Ya Wanawake Organisation (MYWO), a nationwide organisation for women that was formed in 1952.¹⁵ It progressed into the main organisation for women until the 1990s.¹⁶ However, in later years, the organisation was accused of inadequate representation of all women's interests especially of those in the rural areas.¹⁷ Another female's organisation that had a nationwide representation was the National Council for Women in Kenya (NCWK), which was established soon after Kenya's independence in 1964.¹⁸ It was

¹² Action 190-191, UN Beijing Declaration and Platform of Action, 27 October 1995.

¹³ Dakar African Platform for Action, 23 November 1994.

¹⁴ AU, Solemn Declaration on Gender Equality in Africa, 2004.

¹⁵ Kabiru W, Kimani E, The historical journey of women's leadership in Kenya, 3(6), *Journal of Emerging Trends in Educational Research and Policy Studies*, 2012, 842.

¹⁶ Domingo P, MacCullough A, Simbiri F and Wanjala B, Women and power: Shaping the development of Kenya's 2010 Constitution, *Overseas development Institute*, 2016, 17.

¹⁷ Oduol W, Kenya women in politics: An analysis of past and present trends, *Transafrican Journal of history*, 22(1993), 173.

¹⁸ Kamau N, Women and political leadership in Kenya, *Heirich BollStiftung East and Horn of Africa*, 2010, 17.

founded as an umbrella organisation to co-ordinate activities of Kenyan women and formed the Kenyan chapter of the International Council of Women.¹⁹ The initial years of independence up to 1971, point to no major landmarks in women's participation in politics.²⁰ The same is replicated on the side of education as very few women were educated.

The journey²¹ for the women movement gained momentum in February 1992. This is when women were mobilised by NCWK and FEMNET for a National Women's Convention with an objective on how to gain power. Despite this mobilisation, there was little progress and the women were convinced that affirmative action was the way to go. This materialised in 1997, when the first Bill was tabled in parliament. The Bill sought to ensure that there were more women in elective positions through affirmative action. The bill was rejected but the women did not give up. In 1998, Kenya Women's Political Caucus (KWPC), a conglomeration of women's associations advocating for gender parity through affirmative action was set up. In 2000, a second bill seeking to expand the representation of women in the National Assembly was presented but this was opposed once more by the greater number of parliamentarians.²² However, parliament contended that, since the Constitution Review was about to start, the Constitution of Kenya Review Commission (CKRC) was to be requested to include affirmative action in the review. The CKRC was an interparty committee formed by parliament to obtain the views of the public on the procedures of reviewing the Constitution. It was headed by the Attorney General.

KWPC engaged the Attorney General in discussions pertaining to the increase of women in the Constitutional consultations. Such an effort put women at the heart of these consultations. They later maneuvered their way into the process of drafting the Constitution.²³ The famous 'Bomas Draft' stated that the government was to make sure there were reasonable facilities to enable women to realise their full potential.²⁴ The draft did not highlight the gender rule and was eventually voted against by Kenyans in a referendum. The constitutional review process was restarted once again in line with the

¹⁹-< <https://www.breaktheglassceiling.com/the-national-council-of-women-of-kenya> >- accessed on 24 June 2020.

²⁰Oduol W, Kenya women in politics: An analysis of past and present trends, 173.

²¹ Kabiru W, Kimani E, 'The Historical Journey of Women's Leadership in Kenya', 3(6), *Journal of Emerging Trends in Educational Research and Policy Studies*, 2012, 282.

²²Domingo P, MacCullough A, Simbiri F, Wanjala B, 'Women and power: Shaping the development of Kenya's 2010 Constitution, 2016, 17.

²³ Kabiru W, Kimani E, *The Historical Journal of Women's Leadership in Kenya*, 845.

²⁴ Article 37 (4)(b), the Draft Constitution of Kenya, 2004 (BOMAS draft).

National Accord in 2008 and the Committee of Experts was directed to get the views of Kenyans on the changes to be made in the constitution. The women in Kenya managed to get their views heard and incorporated in the harmonised draft. The harmonised draft made a provision that the state was to pass laws and put in place strategies to redress groups that had previously been discriminated.²⁵

The Committee of experts prepared a report on the constitutional review process after stakeholder engagement, of which women were involved. The report highlighted that Kenya was the only country in East Africa that was yet to achieve 30% representation in parliament.²⁶ The committee noted that while the concept of affirmative action had been echoed in all the constitutional review reports, the means of its realisation had not been discussed. It is the effort of women organisations that facilitated the incorporation of the gender rule and its actualisation by the state through the legislature.²⁷

1.2.The Problem Statement.

Whereas article 27(8) of the Constitution advocates for the actualisation of the gender rule, article 38(2) confers Kenyans with the right to elect their representatives in free, fair and regular elections based on universal suffrage. In this regard, the citizens vote based on their interests and specific needs. It is upon this background that they choose their representatives from a variety of competitors and settle on the particular representative that reflects their interests best. The citizens vote for their individual representatives at the constituency level that later on come together to form the National Assembly. The consequence of this is that the composition of the National Assembly may fall short of the threshold of the gender rule at article 27(8).

This has been the situation since the promulgation of the 2010 Constitution. The question that arises is how the two provisions can be reconciled, bearing in mind that the electorate vote on the basis of the candidates that represent their interests and do not pay due regard to the gender requirement at article 27(8). It is upon this backdrop that the study sought to analyse the measures in place as well as the attempted measures to implement article 27(8) of the Constitution in the context of the National Assembly, to interrogate whether the measures in place are compatible with the principle of universal

²⁵ Article 37 (4) and (5), the Draft Constitution of Kenya,

²⁶ The Preliminary report of the committee of experts on constitutional review, Committee of experts on constitutional review, 8th January 2010, 35.

²⁷ Article 81 (b), 27 (8) and 100, the Constitution of Kenya, 2010.

suffrage as a component of democracy and whether the measures adopted by other jurisdictions are relevant to the Kenyan situation.

1.3.Statement of the objectives.

1.3.1. The General objective.

To investigate the dilemma of the implementation of the two thirds gender rule.

1.3.2. Specific objectives.

- i. To analyse the measures in place and the attempted measures to implement Article 27(8) of the Constitution of Kenya in the context of the National Assembly;
- ii. To establish whether the measures in place are compatible with the principle of universal suffrage as a component of democracy; and
- iii. To investigate the relevance of the South African and Namibian experiences to the Kenyan situation.

1.4.Research Questions.

The following questions address the specific objectives of the study.

- i. What are the measures in place and the attempted measures to implement Article 27(8) of the Constitution in the context of the National Assembly?
- ii. Are the measures put in place compatible with the principle of universal suffrage as a component of democracy?
- iii. Are the measures adopted by other jurisdictions, particularly South Africa and Namibia relevant to the Kenyan situation?

1.5.Hypotheses.

- i. The realisation of the two thirds gender rule determines the implementation of gender parity in women representation in the National Assembly.
- ii. The implementation of the two thirds gender rule leads to the attainment of greater substantive equality in the National Assembly.

1.6. Significance of the study.

The study identified the dilemma in the realisation of the two-thirds gender rule which has contributed greatly in its lack of implementation. The dilemma identified is discussed at great length and recommendations are provided for possible solutions to overcome them.

The study is useful to the legislature, the arm of government with the mandate to pass laws that will give effect to article 27(8) of the Constitution. The legislature can take into account some of the recommendations provided by the study as they make relevant laws. The study also offers insight to the women movement in Kenya as well as other women in the community. This is because the study highlights some of the strategies that have been employed by other countries, such as South Africa and Namibia, where there are high numbers of female representatives in their National Assemblies. These strategies are workable and relevant to the Kenyan situation.

1.7. Research Methodology.

This section sought to address the methods of research that were applied in the presentation of the study. The study employed both field-work and desktop research. The field work supplemented the desktop research. The study relied on secondary sources for the desktop research conducted including books, journal articles, case law as well as reports. The study also applied the qualitative and quantitative methods of research. The main data collection instrument was structured questionnaires. The main reason for the use of questionnaires was because they are simple to administer to the target population and easy to analyse the data. Moreover, the format is familiar to most respondents therefore acceptable. The target population for the study was made up of members of the Kenyan National Assembly.

1.7.1. Quantitative and qualitative research methods.

Using the quantitative method, structured questionnaires targeted the collection of data using closed questions. The questions in this category targeted data on gender, age, party membership and voting records of members of parliament selected according to stratified random sampling. The study mainly focused on the implementation of the two thirds gender principle. The sample population was stratified into four groups comprising of male and female elected parliamentarians on one hand and nominated

members on the other. The study used 12% of the total number of members of the National Assembly to act as a representation of the whole population. This is because 12% is within the range used as a form of good practice.²⁸

Moreover, the study used the qualitative method to enhance the questionnaires in a way that they would serve to collect in-depth information. Consequently, the questions were open ended in nature and targeted information regarding; whether the two-third gender rule was the best affirmative action to fill elective positions in National Assembly; whether the sample population supported the gender rule and their reasons for supporting it or for opposing it. The quantitative method sought to confirm the assumptions of the study whereas the qualitative method enhanced the assumptions by exploring the problem of the study.²⁹

Additionally, the study used South Africa and Namibia as comparative studies. The two jurisdictions have surpassed the two-third threshold in their National Assemblies and consequently drawing lessons from the two jurisdictions was important for the study.

1.8.Limitations to the study.

1.8.1. Time factor.

The challenge of time was due to the delay of response from the National Assembly where the study was carried out. It was also a bit challenging to get many MPs to fill the questionnaires which delayed the study.

1.8.2. Bias.

The challenge of actualising the gender rule has divided members of the National Assembly into those who support it and those who do not support it, positions determined by different interests. This posed a problem where some of the study population would have given an opinion that is not objective. This was addressed by introducing a variety of questions in the questionnaires.

²⁸ Practical tools for International Development -< <http://www.tools4dev.org/resources/how-to-choose-a-sample-size/#:~:text=A%20good%20maximum%20sample%20size,%2C%2010%25%20would%20be%2020%2C000> >- accessed on 30 October 2020

²⁹Family Health International, Quality research methods overview, -< <https://course.ccs.neu.edu/is4800sp12/resources/qualmethods.pdf> >- accessed on 24 June 2020.

1.9.Chapter breakdown.

The study has five chapters:

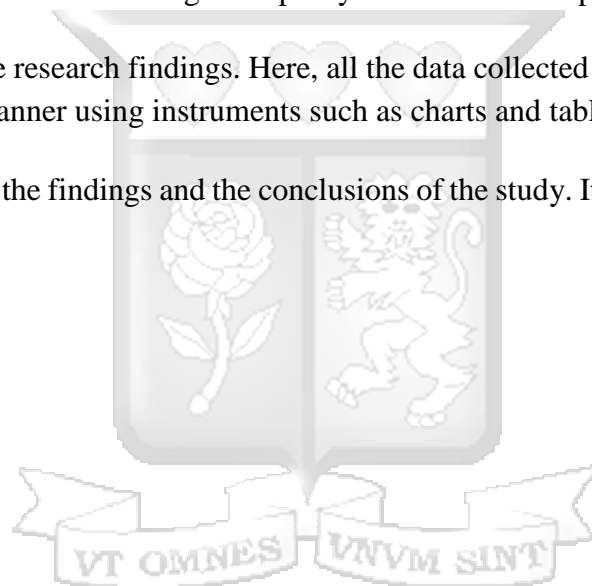
Chapter one covers the introduction of the study and discusses the background of the research question, the problem statement, hypotheses, methodology and limitations of the research study.

Chapter two deliberates the Theoretical and conceptual framework of the study, namely the critical mass theory, the substantive equality theories for the analysis of the gender rule. It also focuses on two approaches including the substantive and descriptive approaches to examine the representation of ideals and the will of the people as well as the interests of various groups among the people.

Chapter three reviews the literature on gender parity in the context of parliamentary representation.

Chapter four presents the research findings. Here, all the data collected was interpreted and presented in a simple and a clear manner using instruments such as charts and tables.

Chapter five summarises the findings and the conclusions of the study. It then offers recommendations based on the findings.



2. CHAPTER TWO: THE THEORETICAL & CONCEPTUAL FRAMEWORK.

2.0.Introduction.

The current study applied the Critical Mass and substantive equality theories for the analysis of the gender rule. It also applied the substantive and the descriptive approaches in analysing the goal of achieving the gender rule.

2.1.Critical Mass Theory.

The debate on the concept of critical mass³⁰ is derived from nuclear physics and denotes the least quantity of workable material required for a sustainable nuclear chain reaction. Critical mass has been applied in social sciences especially in research on gender and minorities conducted by Rosabeth Kanter and Drude Dahlerup.³¹ They analysed the experiences of the female gender that constituted a minor percentage in companies and among politicians.

Despite the fact that the two scholars focus on the reaction of women towards being side-lined, each scholar makes assumptions with regards to how the experiences will vary with the increase of the female gender.³² In her study of the American corporation, Kanter points out four main groups based on different proportional representation of socially dissimilar people namely:³³ the uniform group with its culture dominating the organisation and has no significant minority; the skewed group where the minority are not more than 15 per cent; the tilted group, that ranges from 15-40% of the marginalised group; and lastly the balanced group which has a marginalised group constituting over 40% and the group is attaining considerable influence. She argues that the relative numbers of women are crucial to their performance and efficiency in corporations and the problems of these women spring from their minority position in the organisation and not from the fact that they are women.³⁴

³⁰ Campbell R, Childs S, *Deeds and Words, Gendering Politics after Joni Lovenduski*, ECPR Press, United Kingdom, 2014 139.

³¹ Krook M, Childs S, Critical Mass Theory and Women's Political Representation, 56(10), *Political Studies*, 2008, 725.

³² Krook M *et al*, Critical Mass Theory and Women's Political Representation, 725

³³ Kanter R, *Men and Women of the Corporation*, Basic Books, New York, 1977, 239.

³⁴ Dahlerup D, From small to a large minority: Women in Scandinavian politics, 50, *Scandinavian Political Studies*, 2007, 275.

Critical mass theory describes the particular percentage of staff required to influence the decision making in the institution as a noticeable group.³⁵ The idea of critical mass has been applied when the representation of women is less than 30%, however, a greater change would be experienced when the number in an institution exceeds 30%.³⁶

The theory³⁷ has been used to expound more on the number of the female gender in legislatures. There is a presumption that if the 30% or more is attained, there will be a difference in the conduct of the political class and consequently decision making at the legislative level. Unlike women in the corporate world, women representatives must attest that they are as able as their male counterparts and there is a significant impact made when more females are voted into the legislature.³⁸

The theory³⁹ is also used to explain why the female representatives appear not to advocate for their fellow women when they are in political office. Several authors have argued that this pattern is due to the few numbers of the female gender in most parliaments and will only begin to change when their numbers have grown into a substantial minority of the legislators. However, some authors have found that women make an impact as a small marginalised group.⁴⁰ They have established that the increase in percentage of female legislators reduces their chances of representing women as a marginalised group, thus casting doubt on its relevance.

There are various authors that have criticised the theory. For instance⁴¹ the fraction of women in an organisation who form a critical mass is often left unclear. There is no unanimous value acknowledged as a percentage that will result in the influence in policy making in legislatures and other spheres. There is no empirical evidence to support such assertions either. Moreover, there is little international indication that having a certain percentage of female legislators can have an impact in the legislatures.

In some jurisdictions especially those outside USA, the critical mass argument is more doubtful owing to the great impact of party allegiance in decision making and electing representatives.⁴²

³⁵ Dahlerup D, Women in Scandinavian politics, 139.

³⁶ Dahlerup D, Women in Scandinavian politics, 275-276

³⁷ Studlar D, Mcallister I, Does a critical mass exist? A comparative analysis of women's legislative representation since 1950, *European Journal of Political Research*, 2002, 233.

³⁸ Dahlerup D, Women in Scandinavian politics, 276.

³⁹ Krook M *et al*, Critical Mass Theory and Women's Political Representation 725.

⁴⁰ Krook M, *et al*, Critical Mass Theory and Women's Political Representation 725.

⁴¹ Studlar D, Mcallister I, Does a critical mass exist? 234.

⁴² Studlar D and Mcallister I, Does a critical mass exist? 247.

2.2.Substantive equality theory.

This theory is adequately explained together with formal equality. The idea of formal equality is often associated with Aristotle's assertion that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness."⁴³ Formal equality focuses on the fact that individual characteristics ought to be seen as immaterial in deciding if a person has a right to a particular societal gain.⁴⁴ However, the failure of formal equality to deal with deep-rooted disadvantage led to calls to replace it with substantive equality.⁴⁵ Substantive equality focuses on the distinctive grounds of disadvantage by a particular group, in this case women.⁴⁶

There is no unanimity on the definition of substantive equality. Most of the available definitions largely attribute substantive equality to a process of achieving equality of women and men by requiring that women are empowered by a favourable environment for purposes of attaining equality of results. Since this is a general approach, the study applied the definition identified by Fredman which has given substantive equality a broader view described in two major concepts: Equality of opportunity on one hand and Equality of results on the other.⁴⁷

2.2.1. Equality of opportunity.

It is based on a system where measures are put in place to remedy past discrimination to ensure that people from all groups in the society are at the same starting place.⁴⁸ The approach strives to level the playing field despite the status of an individual in the society in order to increase the equality of opportunity. In relation to this paper, it raises the question as to whether the men and female legislators in Kenya have the equality of opportunity when they decide to run for elective posts. There have been arguments that, even though on the face of it there seems to be equal opportunity for both male and

⁴³ Chemerinsky E, In Defense of Equality: A Reply to Professor Westen, (81), Michigan Law Review, 1983, 578.

⁴⁴ Equal Rights Trust, The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality-<<https://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination.%20Formal%20and%20Substantive%20Equality.pdf> >- accessed on 8 June 2020.

⁴⁵ Fredman S, Albertyn C, Introduction: Substantive Equality, Social Rights and Women: A Comparative Perspective, 23(2), *South African Journal on Human Rights*, 209.

⁴⁶ Fredman S *et al*, Introduction: Substantive Equality, Social Rights and Women: A Comparative Perspective, 209.

⁴⁷ Fredman S, Substantive equality, 14(3), *International Journal for Constitutional Law*, 2016, 724.

⁴⁸ Equal Rights Trust, The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality -<<https://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination.%20Formal%20and%20Substantive%20Equality.pdf> >- on 28 February 2020.

female candidates, because of inequalities affecting women, they are more disadvantaged than their male counterparts. In this regard, there seems not to be equality of opportunity. In a bid to redress this inequality, the Kenyan Constitution has provided for the election of forty-seven women at the county level, where each county constitutes a single member constituency giving rise to a total of 47 female MPs.⁴⁹ This constitutional provision has increased the opportunity for women to become members of parliament because the women compete among themselves. Despite the increase of opportunity, there is still no level starting point for women. According to the substantive equality theory, the two third gender principle in female representation in the National Assembly is far from being achieved.

The Constitution also provides for direct nominations of women as part of the marginalised groups, which further increases the opportunities of women to become members of the National Assembly.⁵⁰ However, despite all these efforts, the article 27(8) requirement that no more than two thirds of the members of elective positions shall be of the same gender, has not been achieved. It raises the question of adequate measures to enhance a level starting point for both male and female aspirants to the National Assembly. Some authors⁵¹ suggest that in order for the practical realisation of equality of opportunity, there have to be processes in place to guarantee that every citizen in the society has a fair opportunity to meet the criterion for accessing any social good. For instance, ensuring that there is access to education by all members of the society as well as offering special training to groups in the society that have previously been discriminated against. These are some of the processes and strategies that are likely to empower the female aspirants and improve their opportunity in equality of the starting point. These efforts will increase the chance of equal opportunities for women, which should ideally maximise equality of results.

2.2.2. Equality of results.

According to CEDAW, the equality of results means that all persons, including women, can enjoy their rights equally, including joining decision making bodies.⁵² Substantive equality, by socially restructuring the principle of equality, attempts to provide substance to the concept by adding the

⁴⁹ Article 97 (1) b of the Constitution.

⁵⁰ Article 97(1)(c) as read with Article 100 of the Constitution.

⁵¹ Fredman S, Substantive equality, 724

⁵² *CCPR General Comment No. 25, On article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, 3.

equality of results. Fredman indicates that this concept can be applied in three different ways. First, it focuses on the influence of fair treatment to the person; secondly, it looks at the outcome in a group for instance females, and ethnic minorities; and thirdly, it seeks for the equal results for example equality of both gender in representing the citizens in parliament.⁵³ The concept is evident through the policies and legal mechanisms that are in place such as affirmative action. The main focus of equality of results is to guarantee a fairer circulation of the societal goods. Consequently, the application of affirmative action for bridging the equal treatment principle is seen as furthering equality of results.⁵⁴

In Kenya, the unequal numbers of male and female in the National Assembly has been a huge bone of contention. The women movement in Kenya launched several campaigns to ensure that there was increased women representation, through affirmative action. It is upon this backdrop that the two third gender rule was included in the Constitution. In this regard, the Constitution requires the Government to ensure that laws are enacted to realise the gender rule.⁵⁵ The government is also required to put in place other affirmative action measures especially through enabling policies. Although this has raised a debate on implementation, it is nevertheless a good step in creating more political opportunities for women and this is seen as a process towards equality of results.

Equality of results can be linked to redistributive justice. In this context,⁵⁶ an approach which is more results oriented in a redistributive sense, defines equality as fair participation, access to education and necessary training. This aims at overcoming under- representation of marginalised groups and to guarantee their just share in the allocation societal goods. This may require special measures such as affirmative action to overcome the disadvantages.

Substantive equality has been criticised for focusing on some underprivileged groups in the society which moves the discussion away from the wider conversation about the underlying problems facing such groups and how they can be alleviated.⁵⁷ This demonstrates that, the approach may focus on

⁵³ Barnard C, Hepple B, Substantive equality, *Cambridge Law Journal*, 59(3), 2000, 564.

⁵⁴ Fredman S, Substantive equality, , 721.

⁵⁵ Article 27(8) of the Constitution.

⁵⁶ Barnard C *et al*, Substantive Equality, 565.

⁵⁷ -<<https://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf> > accessed on 6 June 2020, 5.

seeking changes that provide substantive equality and fail to address the root cause of historical or inherent gender discrimination or gender inequalities in elective leadership.⁵⁸

It is important to take into account the fact that both equality of opportunity and equality of results are aimed at achieving equality of the members of society. Even though this is a right guaranteed under the Constitution of Kenya, it exists alongside other rights. Article 27(8) of the Constitution tries to ensure that there is some sort of equality of results but fails to take into account that there are some results, for instance electoral results, whose outcomes cannot be pre-determined.

2.3.The substantive and descriptive approach to representation.

Representation can be considered as a vital element of democracy in today's society especially where elections are done directly by universal suffrage.⁵⁹ Political democracy entails a situation where the citizens have an opportunity to participate in voting for the government to govern them, thus the phrase 'a government by the people for the people'.⁶⁰ Representation requires that citizens being sovereign, deserve to be heard and their preferences ought to finally carry the day.⁶¹ Substantive approach alludes to the capacity of the agents to represent the aspirations of the citizens who chose them.⁶² In this regard, the people vote for candidates that represent their ideals and welfare. The Constitution grants the citizens the right to elect the leaders that they want based on the principle of universal suffrage.⁶³ The idea behind substantive representation is that great representation relies upon the manner in which the elected persons are capable of making decisions that reflect the needs of the people since they are expected to know them.

On the other hand, the descriptive representation centres on the strengthening of minority groups and affirms that their elected members ought to be a mirror of those represented to ensure that everyone is included.⁶⁴ In descriptive representation, the main concern is to ensure that the members of all the

⁵⁸<https://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf> > accessed on 6 June 2020, 5.

⁵⁹ Article 38(2), Constitution of Kenya.

⁶⁰ Article 38(3)(b), Constitution of Kenya.

⁶¹ Article 1(1), Constitution of Kenya.

⁶² Swers L, Connecting descriptive and substantive representation: an analysis of sex differences in co-sponsorship activity, 30(3), *Legislative studies quarterly*, 2005, 408.

⁶³ Article 38(2), the Constitution of Kenya.

⁶⁴ Buhlmann M, Widmer A, Schadel L, 'Substantive and Descriptive Representation in Swiss Cantons'16 (3), *Swiss Political Science Review*, 2010, 566.

groups in the society are equally represented, and in the event that one of the groups is not represented, then it implies that their interests are restrained.⁶⁵ In Kenya, the Constitution provides for the representation of minorities and marginalised groups in the National Assembly.⁶⁶ Women have been considered as a marginalised group in the country and there have been measures put in place to increase their representation in the National Assembly. These measures however, have failed to meet the threshold set by article 27(8) of the Constitution.

The women movement in Kenya have argued that about half the population of the Kenyan Citizens is female and therefore their representation should be commensurate to their numbers. The argument fails to take into consideration the fact that everyone has the right to vote and elect leaders of their choice and reconciling the same has become a challenge. Moreover, there have been several authors who have disputed descriptive representation claiming that insisting on social identity of groups is irrelevant in constituency representation.⁶⁷ This is majorly because the citizens elect representatives based on their ideals and interests and not their demographic composition.⁶⁸ The study gathers insight from this approach on the importance of the ideals that the masses have, and more specifically, that these ideals affect the manner in which they choose their representatives. Even though both approaches have different premises, they advocate for the participation of the citizens in electing their representatives.

2.4. Conclusion

This chapter began by discussing the theoretical and conceptual framework of the study. The critical mass theory explains the rationale behind the two thirds gender rule. It explains that a critical mass of about 30% of women is needed to exert influence in the legislature and other institutions. The substantive equality theory recognises other factors that have to be considered when discussing the question of equality. It explains that, to achieve gender parity, measures to enhance equality of opportunity and equality of results are necessary. Additionally, the substantive and descriptive approaches are discussed. Their main focus is that, whereas the substantive approach alludes to the capacity of the agents to represent the aspirations of the citizens who chose them, the concern of

⁶⁵ Buhlmann M, *et al*, 'Substantive and Descriptive Representation in Swiss Cantons', 566.

⁶⁶ Article 98, 100, the Constitution of Kenya.

⁶⁷ Swers L, 'Connecting descriptive and substantive representation', 408.

⁶⁸ Buhlmann M, *et al*, 'Substantive and Descriptive Representation in Swiss Cantons', 566.

descriptive approach is to ensure that the members of all the groups in the society are equally represented.



3. CHAPTER THREE: LITERATURE REVIEW.

3.1.Introduction.

This chapter has focused on the literature relating to the dilemma of the implementation of the gender rule in article 27(8) of the Constitution. Upon the promulgation of the 2010 Constitution, it was hoped that the gender rule would be implemented as soon as possible. Several measures were attempted by several stakeholders to try and realise the gender rule however, to date this goal has not been achieved. The main challenge that has arisen in realising the constitutional threshold is the fact that there are other competing constitutional rights involved. Whereas article 27(8) of the Constitution advocates for the implementation of the gender rule, article 38(2) confers Kenyans the right to elect their representatives in free, fair and regular elections based on universal suffrage. The problem is that, while article 27(8) specifies that no more than two thirds of the members of elective positions shall be of the same gender, article 38(2) makes it difficult for the results of an election to be predetermined in terms of gender balance.

The Chapter begins with discussions on the legal framework in Kenya and the international level that have contributed to the advocacy for gender parity. This is followed by the literature on the measures in place and attempted measures to implement article 27(8) of the Constitution in the context of the National Assembly, as well as interrogating whether the measures in place are compatible with the principle of universal suffrage. Such measures will include the universal suffrage itself, the two third gender rule, affirmative action, the judicial and parliamentary measures.

3.2.The Legal Framework.

The legal framework covers both the Kenyan and international laws that relate to the gender parity in legislatures.

3.2.1. The Constitution of Kenya.

The 2010 Constitution outlines provisions designed to attain gender equity in the legislature and other institutions. It requires the government to pass laws and put in place processes such as affirmative

action programmes to accommodate groups that have previously been underprivileged.⁶⁹ The women are one of the groups presumed to have faced past discrimination in terms of accessing leadership opportunities and are part of the marginalised groups.⁷⁰ Subsequently, the Constitution necessitates the system of elections to conform to the two-thirds principle in all elective public bodies.⁷¹ In the quest to achieve gender parity in Kenya, the constitution reserves seats for women only in the counties, where women compete against each other for slots in the National Assembly.⁷² They also have an opportunity to be nominated to the National Assembly by their parties.⁷³ For instance there are more women nominated to the national Assembly than other marginalised groups.

As the Constitution provides for the measures to achieve gender parity, the right of the voters come to play. The Constitution reiterates the citizens' sovereign power which they may donate to their democratically elected representatives who form the National Assembly.⁷⁴ The Constitution further guarantees citizens the right to elect their representatives under the principle of universal suffrage.⁷⁵ This right requires that the process of elections upholds the will of the people.

3.2.2. Political parties act, 2011.

Political parties are the main vehicles through which politicians join parliament and their significance cannot be understated. The Constitution requires the political parties to conform to democratic principles of good governance by making it conducive for both genders to engage in the party activities.⁷⁶ The legislation is the primary source of regulation for political parties in Kenya. The act provides for the gender rule and requires that the composition of political parties reflect the gender rule. The Act states that in order for a political party to be given registration, provisional or full registration, they must respect the gender rule.⁷⁷ The Act also requires the constitutions of all the political parties to make provision for the gender rule taking into account all the arms of the party.⁷⁸

⁶⁹ Article 27(6), the Constitution of Kenya.

⁷⁰ Article 100(b) the Constitution of Kenya.

⁷¹ Article 81(b), the Constitution of Kenya.

⁷² Article 97(1)b and c, the Constitution of Kenya.

⁷³ Article 97(1) c, the Constitution of Kenya

⁷⁴ Article 1(1) and (2), the Constitution of Kenya.

⁷⁵ Article 38(2), the Constitution of Kenya.

⁷⁶ Article 91(1) d, the Constitution of Kenya.

⁷⁷ Section 6 and 7, the Political Parties Act, 2011.

⁷⁸ Section 9, the Political Parties Act, 2011.

The political parties whose membership does not reflect the gender rule are not entitled to get any monies from the Political party fund.⁷⁹

3.2.3. Independent Electoral and Boundaries Commission Act, 2011.

The Independent Electoral and Boundaries Commission (IEBC) is mandated by the Constitution under article 88 to run the election process of the country. The commission is guided by general principles including the freedom of citizens to exercise their political rights under Article 38 of the Constitution, the gender rule and universal suffrage.⁸⁰

3.2.4. International legal framework.

The two main international instruments that address the question of inequality are the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Kenya has ratified both instruments.

3.2.4.1. CEDAW.

The Convention resulted from the UN Commission on the Status of Women's work spanning 30 years. The Commission was instrumental in highlighting the inequalities women faced in contrast to their male counterparts and this resulted in several international and national instruments of which CEDAW is the most central.

The member states to the Convention agreed to put in place, without delay, policies as well as legislation to do away with discrimination against women.⁸¹ In Kenya, article 27(8) responds to this specific obligation as it mandates the legislature to pass laws to enforce the two third gender rule.

The Convention highlights the implementation of short-term special measures, for instance affirmative action, aimed at fast tracking gender equality.⁸²

⁷⁹ Section 25 (2)(b), the Political Parties Act, 2011.

⁸⁰ Section 25, Independent Electoral and Boundaries Commission Act, 2011.

⁸¹ Article 2, *Convention on the Elimination of All Forms of Discrimination against Women* , A/RES/34/180.

⁸² Article 4, *Convention on the Elimination of All Forms of Discrimination against Women* , A/RES/34/180.

3.2.4.2. Maputo Protocol.

The Protocol reiterates the provisions of CEDAW. It provides for legislation to be enacted by member states to eliminate discrimination.⁸³ It also obligates state parties to be proactive in supporting women participating in political life through their laws as well as other measures.⁸⁴

3.3. The principle of universal suffrage.

In Kenya, this principle affords citizens the right to directly vote for their representatives in the legislature and the executive. The principle of universal suffrage guarantees every adult citizen a singular vote and each vote is equal. When this is undermined, the consequence is that the citizens lose their power either directly or indirectly over laws that will bind them which is tantamount to oppression.⁸⁵ The Kenyan Constitution guarantees citizens the right to elect their representatives in free, fair and regular elections.⁸⁶ Having elections regularly is an important component of the democratic process, thus an indispensable feature for good governance as well as the rule of law in any country.⁸⁷

Universal suffrage may be implemented in various ways but the research will highlight the First Past the Post system (FPTP), which is used in Kenya and proportional representation system (PR). In First Past the Post ballot, voters simply put a mark beside the name of the candidate for whom they wish to vote.⁸⁸ At the end of the voting exercise, the body entrusted with the duty to control the electoral system will be able to gather the ballots and proceed to count them. It is the vote counting system that will decide the victors and losers from the total number of aspirants.⁸⁹ On the other hand, proportional representation describes a state where the policy outcome is assumed to be the weighted average of party positions with the weight on each party being equal to its vote.⁹⁰ In this regard, every group

⁸³ Article 2, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo protocol).

⁸⁴ Article 9, the Maputo protocol.

⁸⁵ William S, *Universal Suffrage*, 1838, *JSTOR*, -<www.jstor.org/stable/60210847>- accessed 9 Jan 2020.

⁸⁶ Article 38(2), the 2010 Constitution.

⁸⁷ UNCHR, African Union declaration on the principles governing democratic elections in Africa, AHG/Decl. 1(XXXVIII), 2002, part 2.

⁸⁸ Miller N, The Alternative Vote and Coombs Rule versus First-Past-the-Post: a social choice analysis of simulated data based on English elections, 158(3/4), *Public Choice*, 2014, 399.

⁸⁹ 'The politics of sectarianism in postwar Lebanon', in Salloukh B, Barakat R, Al-Habbal J, Khattab L, Mikaelian S, *Elections, electoral laws, and sectarianism*, Pluto Press, London, 2015, 89.

⁹⁰ Cho S, Voting equilibria under proportional representation, 108(2), *The American Political Science Review*, 2014, 281.

whether majority or minority ought to have influence on policy making proportionate to its size in influence. In a winner take it all, it is presumed that the policy outcomes all belong to the winner but in PR there is no sole winner as the decisions are made in the subsequent bargaining stage where larger parties receive larger shares.⁹¹ However, this finding is not consistent with empirical observations as the average assumption does not support the majoritarian nature of parliament decisions.⁹²

The Constitution appreciates the importance of the people's right to elect the representatives of their choice. Franceschi and Lumumba⁹³ recognise that the will of the people, a vital tenet of democracy, is demonstrated through the process of voting where they select the representatives that will constitute their government. They also recognise that the democratic process is given legitimacy when all the members of the society have an equal right to make decisions on matters of public affairs through voting. They assert that the main reason the voting process needs to reflect the values of equality and free will of the people is to reiterate the validity of the elected representatives by popular vote even when there are a minority that voted otherwise.

Okumo argues that the rule of majority lays in the belief that validity of the authority to make choices concerning the citizens and their nation ought to arise from the will of the people.⁹⁴ This alludes to the sovereignty of the people, which has been referred to as an inherent entitlement that precedes even the Constitution itself.⁹⁵ The people at all times have the power to govern themselves and only vest the power to their elected representatives who they hold accountable. In most cases, the will of the people is expressed through their right to vote.⁹⁶ This not only demonstrates the importance of the right to vote but also underscores the need to ensure that it is not undermined.

When the people exercise their democratic right to vote, they choose the candidates that represent their ideals and welfare and this is referred to as the substantive approach to representation.⁹⁷ The

⁹¹ Cho S, Voting equilibria under proportional representation , 281.

⁹² Cho S, Voting equilibria under proportional representation , 281-282.

⁹³ Franceschi L, Lumumba P, *The Constitution of Kenya: A Commentary*, 2nd Edition, Strathmore University Press, Nairobi, 2019, 187.

⁹⁴ Okumo O, Assessment of Gender Equality in Ethiopia: The Position of Ethiopian Women's Political Representation from the World, Sub-Saharan Africa, and Eastern Africa, 28, *Journal of Law, Policy and Globalization*, 2014, 102.

⁹⁵ Mbondenyi M, Ambani J, *The New Constitutional Law of Kenya: Principles, Government & Human Rights*, Claripress Ltd, Nairobi, 2012, 39.

⁹⁶ Article 38(3)(b), The Constitution of Kenya.

⁹⁷ Swers L, 'Connecting descriptive and substantive representation' 408.

substantive approach alludes to the capacity of the elected members to represent the aspirations of the citizens who chose them. There proponents of the descriptive approach to representation argue that elections should represent the demographic composition of the country.⁹⁸ The main concern of the descriptive representation approach is ensuring that the members of all the groups in the society are equally represented, and in the event that one of the groups is not represented, then it implies that their interests are overlooked. However, since the results of an election cannot be pre-determined, the trend that is prevalent is to ensure that minorities and marginalised groups have representatives to advocate for their welfare. In Kenya, the Constitution provides for the representation of minorities and marginalised groups in the National Assembly.⁹⁹ This means that whereas substantive approach is applied as the people exercise their right to universal suffrage, the descriptive approach becomes necessary as the rights of the marginalised and minorities are safeguarded and inclusivity is achieved. This shows that substantive and descriptive approaches converge at this point.

The women movement in Kenya has advocated for increased representation in line with the descriptive approach. However, since the right to vote lives with the people, it is upon the people to vote for more women representatives. The increased representation of women and the incorporation of their wishes and aspirations in the policy-making processes need to stem from the people's choice according to the substantive approach. Okumo argues that inclusion of women can bring about solutions that make more people in society happy.¹⁰⁰ However, their placement in the political positions and any other decision making bodies will still depend on the choices of those they represent. Many authors have observed that there are many eligible women voters in Africa with the capacity to elect a sufficient number of women leaders. They also have the right to vote in line with the principle of universal suffrage. However, it is unlikely that women will always elect fellow women to parliament. In many occasions, they vote based on their needs and interests. Dolan affirms this position and further notes that even though some women will elect their fellow women; this does not happen most of the time.¹⁰¹ Moreover, there are male representatives that promote the welfare of women and, as a result they are supported by many women. This is a valid critique to the descriptive approach.

⁹⁸ Swers L, 'Connecting descriptive and substantive representation', 408.

⁹⁹ Article 98, 100, the Constitution of Kenya.

¹⁰⁰ Okumo O, Assessment of Gender Equality in Ethiopia, 102.

¹⁰¹ Dolan K, 'Women Voters, Women Candidates: Is there a gender gap in support for women candidates?' in Whitaker L (eds) *Voting: the gender gap*, University of Illinois Press, Urbana; Chicago, 2008, 92-93.

Whereas the principle of universal suffrage accords citizens the right to vote for their leaders, the election results cannot be predetermined. This will have a direct impact on the number of women that will be elected to the National Assembly. This seems to be the case in Kenya, where the number of women directly elected by the people remains lower than anticipated. There is therefore a need for measures that allow increase of the female gender in the National Assembly to be considered since universal suffrage is always going to motivate citizens to vote on merit rather than gender.

3.4.The two third gender rule.

The two third gender principle arises from the quest by the women movement and the human rights groups to achieve gender parity in governing institutions such as parliament. This is especially because, since the time Kenya attained its independence, there had been very few women in parliament. It led to advocacy by the women movement and the human rights groups in Kenya in the 1990s to escalate the number of women in the political sphere, especially the National Assembly. Their efforts facilitated the inclusion of the gender parity agenda in the 2010 Constitution. The Constitution has mandated the Government to take statutory and other measures, including affirmative action programs to remedy any past discrimination.¹⁰² Moreover, the Constitution has authorised the legislature to pass laws or statute that would lead to the realisation of the provisions of the Constitution on gender parity.¹⁰³ In this context, the statute will give guidance in the realisation of gender parity in parliament.

The gender rule basically means that there should be no more than 232 MPs of the same gender in the National Assembly. At the moment there are 273 male MPs in the National Assembly. This would mean that for women to achieve gender parity, they will require a total of 41 more women MPs. The gender rule recognises that there have previously been gender inequalities in the political sphere. The inequality has manifested itself in terms of unequal opportunity for women to compete for political positions. The opportunities may be influenced by economic, political, educational or cultural environment. As a result, the political playing field is uneven from the start, meaning that one gender, in this case the male gender, will have more advantage than women. This inequality of opportunity from the onset leads to the inequality of the results of elective positions. Substantive equality recognises that there needs to be equality of opportunity as a step in achieving equality in the political

¹⁰² Article 27(6), the Constitution of Kenya

¹⁰³ Article 27(8) , the Constitution of Kenya

sphere. The gender rule speaks to the issue of achieving the equality of results and mandates the legislature to come up with laws that will ensure parity is achieved.

However, since the enactment of the Kenyan Constitution in 2010, there has been no law that has been passed pursuant to the mandate granted under article 27(8). This means that the country is far from realising gender parity as stipulated by the Constitution. Despite the fact that the provisions of the gender rule remain unrealised, affirmative policies of the 1990s have seen an increase of women in the political sphere. This is why affirmative action as a measure to enhance the number of women in parliament has to be examined.

3.5.Affirmative action.

Affirmative action describes the actions and programmes that seek to achieve the elimination of barriers that have kept minorities and women out of opportunities in numerous sectors, for instance in the governmental and education sectors.¹⁰⁴ In the recent past, affirmative action has been adopted by many African countries to achieve gender parity in parliament. In fact, African countries that have made good progress in women representation have done so by implementing affirmative action policies.

The type of affirmative action embraced by many parliaments across Africa is gender quotas. The gender quotas system falls under three categories, including the reserved seat, the legislative and voluntary quotas.¹⁰⁵ Reserved seat quotas provide for either voting or appointing of a fixed fraction of women often as a minimum requirement. A new trend is emerging where reserved seats are increasingly filled, not only by appointment, but also by election. According to Krook,¹⁰⁶ reserved seat policies are often done through constitutional review procedures and, sometimes, through acts of parliament. Such electoral laws provide for independent electoral lists for women and set aside specific districts for them to compete against each other. This gender quotas system can be found in countries like Rwanda, Morocco, Uganda and recently Kenya.¹⁰⁷ In Kenya, the constitution has embraced

¹⁰⁴ Smith J, Review: Affirmative action, 27(2), *Howard Law Journal*, 1984, 496.

¹⁰⁵ Toraasen M, Gender parity and symbolic representation of women in Senegal, *University of Bergen*, 2016, 2.

¹⁰⁶ Krook M, Quotas for women in politics: Gender and candidate selection reform worldwide, Oxford university press, 2009, 6-7.

¹⁰⁷ Danlerup D, 'Constitutional Equality: Gender equality and Constitutional Law' 34.

affirmative action with an objective to attain additional political positions for women in the National Assembly as well as in other spheres. The constitution provides for the election of forty-seven women, each elected by registered voters of the counties whereby each county constitutes a single member constituency.¹⁰⁸ The women compete against each other in the women only positions and are commonly referred to as ‘women representatives’, which is interpreted to mean that they represent the affairs of women only in the National Assembly.

The second category is the legislative or legal quotas. Legal quotas refer to the quotas written into the Constitution or otherwise mandated by law, usually in the electoral law or in laws on political parties.¹⁰⁹ In this context, the law requires that, political parties sustain a definite gender composition of the candidates that are selected for public election. For instance, there may be a rule requiring that, at least, thirty or forty per cent of each gender be represented on the candidates list that the political parties present to the voters.¹¹⁰ This category requires parties to put mechanisms in place to ensure that the threshold set by the law is achieved. In most cases, failure to adhere to the set standards by the law can attract some form of penalty. This form of gender quotas is part of the current conversation in Kenya and is being considered by women, as a measure to gender parity. The last one is referred to as voluntary party quotas, which encompasses a certain fraction of women as political aspirants on the nomination lists for parties. It is worth mentioning that voluntary party quotas are not statutory but are based on the good will of the political parties.¹¹¹

The Kenyan Constitution also provides for affirmative action through direct nomination by Parliamentary political parties for groups that have been marginalised in society.¹¹² The marginalised groups have representatives that form part of the legislature to ensure that their interests and needs are represented. Franceschi and Lumumba¹¹³ have remarked that affirmative action in Kenya is in line with realising the right to parity and freedom from discrimination. They have opined that affirmative action in Kenya seeks to ensure that women and other minority groups that were neglected previously are treated as an essential part of the Kenyan society. Women have been identified as a marginalised

¹⁰⁸ Article 97, 1(b), Constitution of Kenya.

¹⁰⁹ Danlerup D, ‘Constitutional Equality: Gender equality and Constitutional Law’, 32.

¹¹⁰ Danlerup D, Constitutional Equality: Gender equality and Constitutional Law, 34.

¹¹¹ Danlerup D, Constitutional Equality: Gender equality and Constitutional Law, 34.

¹¹² Article 100, the Constitution of Kenya [2010].

¹¹³ Franceschi L *et al*, *The Constitution of Kenya: A Commentary*, 2019, 407.

group by the Constitution and, in this regard, they have benefited from direct nominations.¹¹⁴ Affirmative action has somewhat improved the numerical strength of women in the Kenyan National Assembly. Currently there are 16 women directly elected by the citizens to the National Assembly out of the 290 Constituencies. The remaining sixty (60) female MPs joined the National Assembly either by reserved seat quota system or direct nominations as stipulated in the law. The current number of women in the National Assembly may be sufficient to form a critical mass that can exert influence in the House with regards to their participation in legislation. This shows that Kenya is in the right direction in the quest to achieve gender equity, though there is still a long way to achieving the gender rule.

Many authors of gender parity have indicated that Affirmative action is the main solution to the underrepresentation of women in decision making institutions including parliament. Consequently, many African states, for instance; Rwanda, South Africa, Namibia and Kenya, among others, have applied affirmative action in their quest to attain additional numbers of women in parliament. However, this study discusses the weaknesses, criticisms and concerns of affirmative action. It also discusses some of the possible alternative ways to achieve gender parity hence an alternative voice in the gender parity debate.

Some Authors assert that affirmative action is not the definitive answer to the increased number of women in parliament. Andrews acknowledges that, among the most persistent disapprovals of affirmative action is the perception that it does not work on merit, and that unqualified people are given positions, which lowers overall standards.¹¹⁵ The impact of lowering the standards of parliament is the watering down of the honour and clout of parliament, which is not only a symbol of the voice of the people, but also the law making institutions.

In discussing¹¹⁶ the views of the critics that consider gender quotas as discriminatory and violate the principles of equality, King states that the female gender are voted for merely based on their gender and not their leadership qualities. The situation has the consequence of having women representatives

¹¹⁴ Article 97, 1(c), read with Article 100, the Constitution of Kenya.

¹¹⁵ Andrews P, Affirmative action in South Africa, Transformation or Tokenism; Law in context, 15(2),1999, 93.

¹¹⁶ King K, Representation of Women: Constitutional Legislative quotas in Rwanda and Uganda, 1(2) *Charleston law review*, 2007, 225.

who cannot address the constituency matters and women's challenges such as illiteracy and low life expectancy.

Lovenduski, Campbell and Jacent allude to the criticisms of affirmative action through gender quotas, which put forth the argument that by favouring one group over another, the spirit of "rights for all people" is undermined.¹¹⁷ It is because of such policies that the credentials of female representatives and minorities are called into question. It seems that equality is being achieved at the expense of qualified and experienced representatives thereby exposing the counter-productive nature of parity. They have also discussed the reasons why women are underrepresented. For example, women are reluctant to join politics owing to their attachment to their traditional responsibilities and the masculinity of political life.¹¹⁸ Where this is the case, even if quotas are applied, they will not achieve results as women will not articulate the interests of all the people but the women interests. In this context, the critics of the gender quotas system argue that, they are inequitable and unfair, given that women, who end up in parliament by such a system, are likely to be less qualified and less effective than parliamentarians who got into the House on their own merit.¹¹⁹

Williams presents various criticisms of the gender quota systems. First, he indicates that gender quotas are likely to lead to female leaders who have no proper qualifications and thus replacing more-qualified men who would be effective at promoting the goals of the party and constituency.¹²⁰ The competence of representatives, going by the quota system, would be sacrificed to promote gender equality and be unfair to competent men.¹²¹ Likewise the opportunity for men to compete for those seats is removed.¹²² This argument implies that, even though the descriptive approach advocates for more female in the legislature, it does not certainly ensure that the issues of their constituency and women agenda converge in the same direction. Williams further suggests that, the system may guarantee a specific number of women on party lists or even in parliamentary seats, but it does not change the fact that women have a disadvantage in factors that facilitate access to political power, such as education,

¹¹⁷ Lovenduski J, Campbell R, Jacent J, Women public life and democracy: Changing common wealth parliamentary perspectives, *Common wealth parliamentary association with pluto press*, 2002, 49-50.

¹¹⁸ Lovenduski J, Campbell R and Jacent J, Women, public life and democracy: Changing common wealth parliamentary perspectives, 16.

¹¹⁹ Lovenduski J, Women, public life and democracy: Changing common wealth parliamentary perspectives, 120.

¹²⁰ Williams S, Constitutional Equality: Gender equality and Constitutional Law , *Cambridge University press*, 2009, 55.

¹²¹ Williams S, Constitutional Equality: Gender equality and Constitutional Law 55.

¹²² Williams S, Constitutional Equality: Gender equality and Constitutional Law , 55.

economic status, and leadership experience.¹²³ This calls for more focus on the main reasons why there are fewer women in parliament.

According to Bauer, the quota system in Kenya, and elsewhere in Africa, has invalidated the notion that, having more women in parliament would mean legislating with female citizens in mind.¹²⁴ Such invalidation has been attributed to the fact that legislation will be more influenced by the agenda of the party than the interests and ideals of the women.¹²⁵ Bauer further describes the difficulties in holding women to account in parliaments, especially if they are loyalists to their party leaders, who favoured them in nominations or issuance of party tickets at the expense of qualified male candidates.¹²⁶ In this context, any favouritism of a particular gender is a recipe for mistrust and discontent in the constituency and among the male candidates.¹²⁷ The concern here is that the male candidates may have a perception that they are not being offered a level playing ground to compete on merit.

Morna suggests that women who are directly elected by the people are held in higher regard compared to those who are elected through quotas or who hold special seats.¹²⁸ This is attributed to the fact that, those directly elected represent the majority of the people while those who hold special seats are not selected by the people. The situation is likely to have far reaching effects on the women's political career, especially because it will make it hard for women to represent the citizens in other political positions such as governorship, which attracts more responsibilities and clout. It will also reduce the chances of women being elected through the normal route, as they tend to rely on the reserved seats.¹²⁹ Moreover, there is a likelihood of the citizens developing an attitude that women should only compete among themselves in the reserved seats or wait to be nominated as special groups thus creating a unique barrier to vying for other seats. Similarly, a problem of implementation of universal suffrage is likely to arise because, if the number of those holding reserved seats is high, there will be many leaders not elected by the people.

¹²³ Williams S, Constitutional Equality: Gender equality and constitutional Law, 56.

¹²⁴ Bauer G, Gender and participation of Africa's electoral regimes: An analysis of variation in the gender gap < <http://democracyinafrica.org/gender-quotas-womens-representation-african-parliaments> >.

¹²⁵ Bauer G, Gender and participation of Africa's electoral regimes.

¹²⁶ Bauer G, Gender and participation of Africa's electoral regimes.

¹²⁷ Bauer G, Gender and participation of Africa's electoral regimes.

¹²⁸ Morna C, Beyond numbers: Quotas in practice, Paper presented at the IDEA workshop on the implementation of quotas: African Perspective at Pretoria, 11 November 2003, 114.

¹²⁹ Morna C, Beyond numbers: Quotas in practise 114.

Conner alludes to the criticism that those who make it to parliament through the gender quota system have been underrated and viewed as not politically deserving, especially through direct nominations.¹³⁰ This contributes to denying women the opportunity of being elected directly by the people and thus do not wield the power and clout enjoyed by those directly elected. The quota systems have even been equated by critics to a 'glass ceiling' out of which the female gender could not grow without putting in extra effort like their male counterparts.¹³¹ This is for instance, the struggle of submitting their candidacy to compete at the party level to garner the support of the people. Once they win in the party primaries, they have a better opportunity to succeed in the elections.

Leyenaar also echoes some of the criticisms that have been raised by the opponents of gender quotas including that quotas are prejudicial: they promote symbolic female representatives and erode the spirit of equal opportunity.¹³² This means that female representatives are assisted due to their symbolic value, and not because of substantive leadership. The trend is likely to water down the reputation of women politicians especially those who secure positions in parliament through gender quotas.

Thabane and Butelezi attribute the minimum numbers of women in parliaments to barriers that can be tackled by focusing on the root cause of the barriers such as lack of education and financial endowment.¹³³ Education is appreciated as the main gateway to securing jobs and thus financial empowerment. Financial empowerment opens more opportunities in politics resulting to the numerical increase of women in the National Assembly.

Similarly, in their study, Anyango, Opoku and Alupoin established various challenges that hinder women from winning an election. These include lack of support from fellow women who discouraged them or even fail to vote for them when contesting for national office; political violence and propaganda as well as financial constraints.¹³⁴ It is vital for the stakeholders to consider focusing on the alleviation of these barriers for posterity.

¹³⁰ Conner B, 'You Made a Mistake - You Selected Women: The Implementation of Political Gender Quotas in Post-conflict African Nations' 17(1), *Tulane Journal of International and Comparative Law*, 2008, 212-213.

¹³¹ Conner B, 'You Made a Mistake - You Selected Women', 212-213.

¹³² Leyenaar M, Political empowerment of women in Netherlands and other countries, 231.

¹³³ Thabane T, Buthelezi M, Bridging the gap between de jure and de facto parliamentary representation of women in Africa, 41(2), *The Comparative and International Law Journal of South Africa*, 2008, 186.

¹³⁴ Anyango B, Opoku B, Alupo M, Women in Politics in Kenya: an Analysis of Participation and Barriers, *Multidisciplinary Journal of Gender Studies*, 7(1), 2018, 1520-1522

Additionally, Nzomo¹³⁵ observes that although women leaders have made progress towards enacting gender friendly laws, there are some who do not advocate for matters concerning women. This is attributed to allegiance to specific parties as well as ethnic groups whose interests may override the gender agenda. It is therefore, the role of the stakeholders to include these observations in the gender debate for purposes of giving it a wider perspective and better solutions.

In Kenya, very little emphasis is being put on women being directly elected by the people to the National Assembly which will give them a constituency. Instead, there is more emphasis on the increase of women in the National Assembly through affirmative action such as direct nominations through Parliamentary political parties and reserved seat quotas. Despite this development, the citizens' participation in the election of their representatives to parliament is imperative. Their participation gives the process and those elected legitimacy. It is noteworthy that affirmative action through some gender quotas is constitutional. However, as efforts are being made to further escalate the numerical strength of women in the National Assembly, the right of the people to elect their representatives is of concern and cannot be taken lightly as the power belongs to them, and is only vested upon their representatives.¹³⁶ Substantive equality is not absolute since the application of the approach is only to create opportunities for women to grow in politics. The opportunities being created should be result oriented in that, it should improve the numbers of female representatives in the National Assembly within the parameters of the constitution.

3.6.Measures attempted in realising article 27(8) of the Constitution.

There have been several measures that have been attempted in Kenya in the quest to realise the gender rule. The main measures that have been discussed in this chapter are: Judicial and Parliamentary measures.

3.6.1. Judicial Measures.

There have been three main cases that were taken before the judiciary concerning the gender rule that shall be discussed in this section:

¹³⁵ Nzomo M, Impacts of women in political leadership in Kenya: struggle for participation in governance through affirmative action, *Institute of Diplomacy & International studies*.

¹³⁶ Article 1 (2) and (3) and Article 38(2), the Constitution of Kenya, 2010.

3.6.1.1. The Supreme Court Advisory Opinion in the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR.

After the promulgation of the 2010 Constitution, various human rights groups pursued the actualisation of the gender rule through the court. This prompted the Attorney General to move the Supreme Court to address itself on two issues by way of an advisory opinion. The first issue was on whether articles 81(b), 27(4), 27(6), 27(8), 96, 97, 98, 177(1) (b), 116, 125 of the 2010 Constitution necessitated that the gender rule would be realised progressively or whether it could be realised in the forthcoming 2013 elections. The second issue focused on whether an unsuccessful candidate in a Presidential election was permitted to engage the Supreme Court to contest the said election under article 140. The first issue raised by the attorney general in the advisory opinion concerning the gender rule is what the study shall delve into.

There was a feeling that the actualisation of the gender principle had to happen immediately after and prior to the general election. The Attorney-General highlighted the fact that there was no unanimity in the interpretation of the various articles. The provisions were silent on the timelines for the enactment of the rule. The understanding of the provisions by different groups was diverse and therefore there was a high probability that the gender principle would not be realised in the general election of 2013. This situation would have resulted in a constitutional crisis that could easily render the National Assembly unconstitutional.¹³⁷

It was further stated that the gender-equity clauses were not specific and that the only clear provision was article 97(1) (b), where women representation in parliament is well established. In the event that a sufficient number of women elected could not satisfy the gender principle, then, the only alternative would be through nominations. This would raise the number of representatives beyond the constitutional requirement, consequently creating a disparity between gender proportions and the overall numbers in parliament. Moreover, the tax implication of a large legislature could be overwhelming on the citizenry who are already encumbered with huge tax obligations. The Attorney General implored the court to give an analysis that favoured the progressive realisation of the gender rule in achieving the provisions of the Constitution. The petition was opposed by interested parties and

¹³⁷ Political parties Act, 2011.

amici curiae. They advocated for immediate realisation of the gender principle. Their contention was that Parliament had the constitutional mandate to enact laws that could increase female representation and that they had a five-year window to do so. They argued that the five-year window was closing and the gender rule was yet to be complied with. They urged the court to give direction regarding immediate realisation of the gender rule. The court addressed the concerns raised as follows:

Progressive realisation of a right: The court stated that the concept of progressive realisation emanated from the word progress which is defined as a gradual development to achieve a certain goal. Progressive realisation, thus, means a phased-out realisation of a specific goal. The focus was now on the distinction between realisation of the gender rule in appointive and elective positions. In this context, the court noted that it was easier to achieve immediate realisation of the appointive positions more than the elective positions. In the elective positions, the persons voting for a particular candidate are influenced by their own prejudices and not the specific constitutional requirements. As a result of this, the outcome of an election cannot be pre-determined. On the other hand, appointive positions are controlled by persons that can regulate the outcome.

Immediate Realisation of the Gender Rule: The main argument that was raised by the interested parties was that the immediate implementation of the gender rule was compulsory per article 81(b) necessitating the immediate enforcement of the rule. Their assertion was based on the application of the phrase “shall” in the above provision, which they interpreted to connote a mandatory meaning. This assertion was opposed by the petitioner who interpreted the word ‘shall’ in the above provision to signify a more lenient connotation and thus could favour progressive realisation of the rule. The court affirmed that it was not only parliament or the state law office that had the mandate to develop legislation as public participation was a constitutional imperative. It was the court’s opinion that articles 81(b), 97 and 98 were yet to convert into rights that could be directly enforced.

This meant that the immediate realisation of article 81(b) could not occur before other supporting processes were put in place by the government. The court held that for article 81(b) to be transformed from a principle to a right, articles 97 and 98 had to be amended to include a hard gender quota. In the alternative, new laws had to be passed to support compliance with the gender rule.

Opinion on the Gender-Equity Question: The court considered the arguments presented under this question and concluded that if the gender rule was not enforced before the 2013 elections, then implementation was to be effected by August 2015.

3.6.1.2. The Dissenting Opinion by Retired Chief Justice Willy Mutunga.

The Chief Justice began by acknowledging that Kenyan women have continuously and consistently advocated for parity in all spheres of life. He took note of the struggle by the Kenyan women prior to the promulgation of the 2010 Constitution. He noted that the argument that the gender principle required progressive realisation went against what the women of Kenya had achieved through a long struggle. He was of the view that Katiba Institute was accurate in arguing that the one-third gender requirement was merely a minimum and that progressive realisation should aim at attaining 50/50% threshold in gender parity.

The Chief Justice further noted that article 177 (1) (b) read with articles 27(4), 27 (8) and 81 (b) indicated that the gender rule was to be realised without further delay. He was of the view that immediate actualisation of the gender rule was reinforced by values such as inclusiveness, equality and protection of the marginalised. He stated that such values would be undermined by an interpretation that admitted the progressive actualisation of the gender rule.

The Chief Justice also observed that the requirement that system of election was to conform to the principle under article 81 (b) of the Constitution depended on major stakeholders like the State, the IEBC and political parties. The Chief Justice highlighted the role of political parties as stipulated in article 90 of the Constitution regarding nominations of MPs to parliament and required the nominees to mirror the gender and ethnic diversity of Kenya.

He observed that the IEBC was obligated to ensure that the party lists complied with those rules.

3.6.1.3. Katiba Institute v Independent Electoral and Boundaries Commission (IEBC).

The petitioner, a Constitutional research, Policy and Litigation Institute, filed a petition requesting the court to make a declaration that the IEBC should require political parties to actualise the gender rule. The main contention was that the female gender in Kenya was disadvantaged in terms of their accessibility to certain opportunities especially parliamentary positions.

The petition was premised on the grounds that women in Kenya were disadvantaged, and had very limited prospects in political participation as members of parliament. This was despite the establishment of 47 elective positions wholly set aside for the female gender as members of the National Assembly. The petitioner highlighted that women representation in parliament was less than the required constitutional threshold. They interpreted this to mean that women were still being sidelined by the very institution that had the responsibility to empower them.

The petitioner further argued that while political parties were not under obligation to implement the constitutional provisions on gender in the 2013 elections, the same scenario was likely to repeat itself in the forthcoming 2017 general election. This was attributed to the Respondent's failure to establish measures that compelled political parties to actualise the gender rule as they conducted party primaries and nominations in line with the relevant constitutional provisions. Political parties were very essential in the electoral process and only IEBC had the authority to ensure that they obliged to the actualisation of the gender rule. The respondent objected to the petitioner's assertions and stated that it lacked powers to enforce provisions of Articles 27(8) and 81(b) of the Constitution.

The court after listening to both parties' arguments found that the Constitution bound all persons including political parties as per Article 260. The court also established that political parties were required by article 91(1) to champion for gender equality. They were a vehicle to statutory bodies and eventually into governing positions as they determined who was elected to Parliament, through selection of candidates at party primaries.

The court established that the Constitutional principles bound political parties for purposes of guaranteeing gender parity and equity. In explaining this, the court took note of the fact that Political Parties were financed by the public for various reasons including the enhancement of female representation and that of marginalised groups in parliament. The intention of the Constitution could not have been that Parties funded to effect affirmative action in parliament, failed to integrate the gender principle. The court concluded that the IEBC was mandated by the Constitution to regulate the activities of political parties including nominations. This meant that the IEBC could require the political parties to meet the constitutional threshold.

However, the IEBC seemed to have a valid case because the law implementing the gender rule has not yet been enacted by parliament. In fact, the bill aimed to achieve this has been severally rejected by majority of the parliamentarians. This has left many organisations in a dilemma on the way forward regarding the gender rule.

3.6.1.4. Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR.

The petitioner filed a petition in court seeking for a declaration that the respondent violated the Constitutional provisions, and failed to be guided by the 2012 advisory opinion of the Supreme Court on the implementation of the gender rule. They also requested the court to direct the respondents to draft a bill to be debated in parliament to ensure that the gender rule was implemented. This was to be done within the timelines set by the Supreme Court. The Attorney General opposed the petition and argued that there was a misunderstanding of the gender rule which was not only for the female gender but an affirmative action principle to be used by any gender that was disadvantaged. The situation at the time was that the female gender was disadvantaged but this could easily change in the future.

The court after listening to the parties addressed the questions that were raised. First, the court considered whether the Supreme Court's opinion of 2012 was binding. They answered this in the affirmative, stating that the opinion bore as much judicial weight as any other judgement by the courts. Secondly, the court sought to establish whether the petition was premature and in this regard, it concluded that it was properly before the court. Thirdly, the court considered the question of whether parliament was required to be party to the petition. In this regard, the court established that it was the responsibility of the Attorney General in consultation with the then Constitutional Implementation Commission to draw up a bill and present it to parliament for debate. Fourthly, the court set out to establish whether the Constitution had been violated or was likely to be violated by the respondents. The court found that there was a violation and a likelihood that the violation would continue. Lastly, the court issued the orders of mandamus sought, directing the Attorney General and CIC to prepare the necessary Bill to present to parliament to facilitate the realisation of articles 27(8), 81(b), 100 of the Constitution and the Supreme Court Advisory Opinion within Forty (40) days.

Despite the fact that the two thirds gender rule has not been realised, the various court cases and the court decisions enhanced advocacy for actualisation of the gender rule. The court decisions also shade

more light on gender issues by interpreting the various Constitutional provisions regarding the actualisation of the gender rule.

3.6.2. Parliamentary measures.

In Centre for Rights Education & Awareness (CREAW) case,¹³⁸ the court directed the Attorney General to prepare the necessary bill to facilitate the implementation of the gender principle within forty days. It is upon this backdrop that two bills were drafted and presented before parliament. The two main bills that were drafted are the Constitution of Kenya (Amendment) Bill 2015 and the Constitution of Kenya (Amendment) Bill 2018. The two bills had the objective of implementing of the two third gender rule.

The Constitution of Kenya (Amendment) Bill 2015.

The main aim of the bill was to amend different laws which lay the ground for attaining the required gender threshold stipulated in the constitution. These laws would provide a way forward to the legislature which is required to enact laws that would increase female representation in parliament. The Bill among other things sought to create special seats to bridge the gender gap. Those that would be elected would be eligible to run for two terms only to allow more women to benefit. The bill emphasised the use of party lists in the elections. It proposed for affirmative action to be applied for twenty years with a possible extension of not more than 10 years. However, the Bill was defeated at the voting stage, with only 178 out of the required threshold of 233 MPs voting in favour of the bill.¹³⁹

3.6.2.1. The Constitution of Kenya (Amendment) Bill 2018.

The 2015 Bill was reintroduced in 2018 albeit with minimal amendments. The Bill also aimed at increasing the number of women in the National Assembly in the event the general election failed to meet the constitutional threshold provided for in article 27(8) of the Constitution.¹⁴⁰ The Bill proposed that under the supervision of the IEBC, lists for nominees to contest for elections were to comply with

¹³⁸ Centre for Rights Education & Awareness (CREAW) v Attorney General & another [2015] eKLR.

¹³⁹ The National Gender and Equality Commission, The Journey to Gender Parity in representation, The Search of a framework for the realisation of the not more than two thirds gender principles in Kenya, 2018, 20.

¹⁴⁰ Wang'ondy M, 'The Implementation of the two third gender rule in Kenya; a legal analysis', International Youth Coalition, 2018, < <https://iycoalition.org/implementation-of-the-two-thirds-gender-rule-in-kenya-a-legal-analysis/> > accessed 10 January 2020.

the gender rule. However, when the date for voting came, there was no quorum of 233 MPs required to pass the Bill as most of the male Mps kept out of the National Assembly. The Bill was therefore defeated on a technicality.

3.7.Conclusion.

The literature above discussed the local and international legal framework underpinning the gender rule. The laws and guidelines give the gender parity debate a headway. The study further discussed the principle of universal suffrage as a tenet of democracy and has brought out the fact that the will of the people is imperative in any competitive electoral system. The study reviewed the literature regarding the two thirds gender rule and brings out the dilemma that exists between the gender rule and the principle of universal suffrage. The study discusses some of the measures in place to realise the gender rule and highlights affirmative action as the main measure in place to achieve gender parity. The study then identified and deliberated on the various attempted measures in realising the gender rule focusing on the judicial and parliamentary measures. The Judicial measures enhanced the advocacy for actualisation of the gender principle. The parliamentary measures shed light on the proposals advocated by women and other stakeholders in actualising the gender rule such as: creation of special seats to bridge the gender gap; advocating that those eligible for election under special seats to run for two terms only to allow more women to benefit and the use of party lists in the elections.

The literature reviewed in this chapter also shades light to legislators, women movements, scholars and researchers on the various challenges associated with gender quotas leading to a myriad of criticisms. This would awaken discussions on alternative ways that can be explored as stakeholders look for the long lasting way to achieve gender parity.

4.0. CHAPTER FOUR: DATA PRESENTATION, ANALYSIS AND INTERPRETATION OF FINDINGS.

4.1. Introduction.

The study embarked on a field study to gather data which was analysed and interpreted. It sought to establish why the constitutional provisions on the gender rule had not yet been actualised by the legislature. To achieve this aim, the study also sought to gather the views of the MPs regarding measures that have been attempted so far to actualise the gender principle and why they seem to have been unsuccessful.

The main research tool used to collect data was a set of questionnaires, formulated in line with the study's general and specific objectives. To ensure that the data collected was of quality and valid, structured and unstructured questions were included. The data gathered from the study was cleaned and entered on to a Microsoft Excel Spreadsheet and the results of the datasets used to identify the underlying issues that hamper the realisation of the gender rule.

4.2. Response Rate.

This study targeted 12% of the population of MPs. This comprised of 45 MPs who filled the administered questionnaires.

4.3. Descriptive Statistics.

The 45 sampled respondents were members of the National Assembly comprising of 12.89% of the total population of the MPs. The target population comprised of 95.5% of elected members of which 22.2% were female and 73.3% were male while 4.5% nominated MPs were female only. The elected respondents were drawn from various political parties: ANC party (4.44%), FORD Kenya party (2.22%), Jubilee party (51.11%) ODM party (26.67%) and Wiper party (11.11%). Most respondents were University graduates and only a few respondents were post graduate degree holders.

4.4. Assessment of the existing measures to implement Article 27(8) of the Constitution of Kenya in the context of the National Assembly.

As a background, the way of accessing political office is through direct election. To the question whether direct elections could boost the percentage of female legislators, a minority comprising of 21.95% (9) elected male MPs were of the view that the gender rule was achievable through elections. They stated that it could be achieved progressively if women were patient; if they were provided with equal opportunity as men and if they could mobilise the support of fellow women. Moreover, they stated that once women had proven themselves and demonstrated good leadership more of them could be elected.

On the other hand, a majority of the elected male MPs 53.65% (22) were of the view that elections were not the solution to enhancing the percentage of female legislators in the National Assembly. The reason being that women were not putting in enough effort to compete with their male counterparts. Part of this majority was of the view that the participation of the female gender in the general elections was still minimal and, therefore, the realisation of the gender rule would not be immediate. The male MPs also stated that women did not readily vote for their fellow women which is a disadvantage for women candidates. Some of the male MPs stated that culture and traditional attitudes towards women such as being considered weak denied them equal opportunity in elections.

12.20% (5) of the elected women MPs were of the view that the gender rule was achievable through elections. They justified this by stating that women were as good leaders as men and, if given an equal playing ground with their male counterparts, more of them could be elected. Another 12.20% (5) were of a contrary opinion and stated that the two third gender rule is not achievable through elections.

The women respondents further cited various reasons that hinder them from achieving the two thirds gender rule. Some of them stated that they lacked adequate funding to conduct their campaigns which were a huge hindrance. Others were of the view that women had fewer opportunities in politics because it was a male dominated career. This discouraged many women from taking part in political life. Some stated that electoral violence also served as a deterring factor to women who wanted to participate in politics. They indicated that the male-controlled nature of the African society undermined the

prospects of the female gender in political leadership. As a result of this, they were not able to receive support from their families and the community when they decided to join politics.

It is upon this backdrop that the research aimed at identifying and assessing whether the reserved seats and direct nominations could contribute to the realisation of the gender rule. These are the measures provided for in the constitution.

4.4.1. Effectiveness of reserved seats in implementing the two thirds gender rule.

61.29% (25) of the respondents were of the view that reserved seats will not expand the number of female legislators in the National Assembly. The reason given for this is that the roles and responsibilities of those holding the reserved seats are not clearly defined which leads to MPs elected in this way to be perceived as lax and having no role to play in the National Assembly. Another reason given is that those already given the opportunity have not done much to prove effective representation of the people. This means that the ideals of the people and especially those of women cannot effectively be represented this way. Moreover, the reservation of seats defeats the purpose of equality of all gender. This agrees with King's assertion that gender quotas are discriminatory and violate the principles of equality.¹⁴¹ Finally, the same set of respondents were of the view that reserved seats can only achieve superficial representation as no leader can represent one gender.

On the other hand, 38.70% (16) respondents were of the view that reserved seats will result in better female representation in parliament because through reserved seats representation of women is guaranteed. These respondents are of the view that to some extent, women understand the interests of women and can represent their issues well. Finally, their opinion is that reserved seats bring about regional balance especially where women are discriminated against and cannot easily make it to the National Assembly.

4.4.2. The role of direct nominations in bridging gender gap.

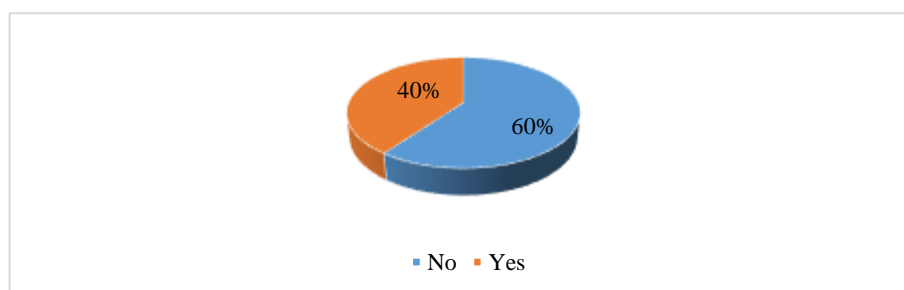
	Elected female respondents	Percentage
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¹⁴¹ King K, Representation of Women: Constitutional Legislative quotas in Rwanda and Uganda, 1(2) *Charleston law review*, 2007, 225.

Yes	06	60%
No	04	40%
Total	10	100%

Table 4.1. . Elected women MPs' responses on the role of nominations in bridging the gender gap.

Chart 4.1 Direct nominations to bridge the gender gap.



The study focused on the elected female respondents, who were asked whether direct nominations were the right way to bridge the gender gap in the National Assembly. The choice of the group was based on the need to get a considered view of those who were perceived to be keen on achieving gender parity. Table 4.1 and Chart 4.1 shows that majority of them (60%) were of the view that nominations were not the right way to bridge the gender gap. The main reason for this position was that women were able and ready to compete in fair elections with their male counterparts if, the grounds were favorable for them. They also think that direct nominations infringe on the rights of the voters, taking into account the fact that the preferred way of election in Kenya is universal suffrage. This confirms Franceschi and Lumumba's observation that the will of the people, a vital tenet of democracy, is demonstrated through the process of voting where they select the representatives that will constitute their government.¹⁴²

Another hurdle is that only a few women could be nominated and through this path it could be difficult to meet the demand of the gender rule. While only a few women would be nominated the positions were not distributed on merit.

¹⁴² Franceschi L *et al*, *The Constitution of Kenya: A Commentary*, 187.

On the other hand, a minority (40%) female respondents thought that direct nominations could serve as a solution in the realisation of the gender rule since the patriarchal nature in Kenya leaves women with fewer opportunities. These respondents are of the opinion that direct nominations would ensure almost equal chance with men and therefore contribute to realising the gender rule.

4.4.3. Compatibility of the existing measures with the principle of universal suffrage as a component of democracy in Kenya.

Universal suffrage as a component of direct democracy entails the right of the citizens to elect their representatives to all elective offices in Kenya. The question becomes whether direct nominations and reserved seats are compatible with the citizens' right to directly elect their leaders to the National Assembly.

4.4.4. Responses on compatibility of reserved seats and direct nomination with the principle of universal suffrage.

Table 4.2. Responses on compatibility of reserved seats and direct nominations with universal suffrage.

	Yes	%	No	%	Total respondents
Male	23	56.10%	8	19.5%	31
Female	5	12.20%	5	12.20%	10
Total	28	68.30%	13	31.7%	41

Chart 4. 2 .Responses on reserved seats and Direct nominations.

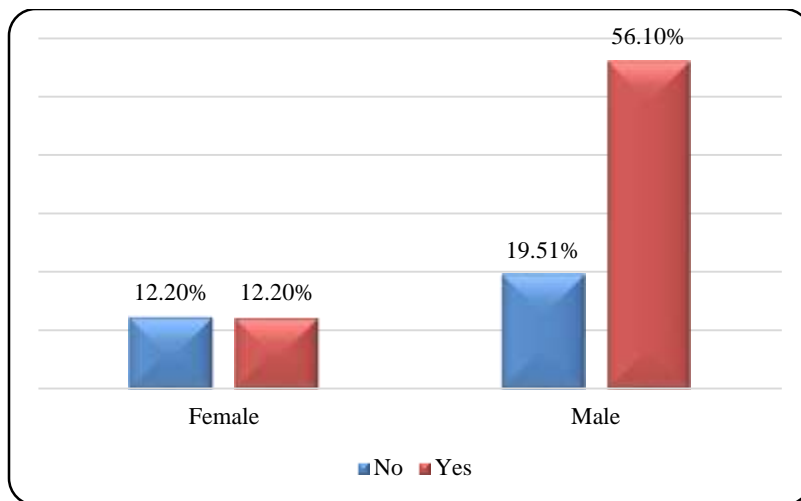


Table 4.2 and Chart 4.2 show that majority of the male (56.10%) and female (12.20%) respondents were of the view that direct nominations will undermine the role of the citizens in choosing women as MPS of their choice. This conforms with the Constitution of Kenya that guarantees citizens the right to elect their representatives in free, fair and regular elections.¹⁴³ Among the same respondents there is an opinion that nominations were likely to lead to discrimination against men. This is in agreement with the views of Bauer who has stated that any favouritism of a particular gender is a recipe for mistrust and discontent in the constituency and among the male candidates. This is based on the concern that the male candidates may have a perception that they are not being offered a level playing ground to compete on merit.¹⁴⁴

The respondents further observed that nominations would not consider merit as they are not subjected to competition and election. Some further stated that nominations as opposed to being elected by the people would create a perception that women are weak and can only be nominated. This confirms Morna's assertion that there is a likelihood of the citizens developing an attitude that women should only compete among themselves or wait to be nominated as special groups thus creating a unique barrier in vying for other seats. The respondents also observed that there is a loophole in terms of criteria to nominate women which is likely to lead to bias and used to reward cronies of the party leaders. These would be more influenced by the agenda of the party than the interests and ideals of the

¹⁴³ Article 38(2), the 2010 Constitution.

¹⁴⁴ Bauer G, Gender and participation of Africa's electoral regimes: An analysis of variation in the gender gap.

women.¹⁴⁵ Likewise, allegiance to the party would be more than their allegiance to the people which is likely to damage the perception of women Mps.¹⁴⁶ Another set of respondents were of the view that women should compete with men equally since they say they are equal to men.

On the other hand, a minority of the male (19.51%) and female (12.20 %) respondents were of the contrary opinion. According to them, nominations would not undermine the role of the citizens in choosing women as members of the national assembly. They stated that the citizens are first given an opportunity to vote before nominations are done. Therefore, they exercise the universal suffrage well ahead of nominations.

4.5. Assessment of other attempted measures to realise the two third gender rule.

There are various measures that have been adopted to realise the gender rule as discussed below:

4.5.1. Women empowerment as a measure to implement the two thirds gender rule.

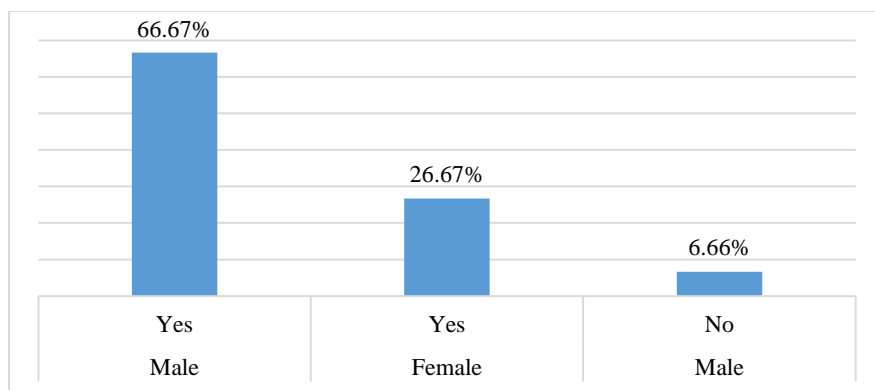
Table 4.3. Responses on women empowerment.

	Yes	Percentage	No	Percentage	Total
Male	30	66.67%	3	26.67%	33
Female	12	6.66	0	0	12
Total	42	73.34%	13	26.67%	45

Chart 4.3. Responses on women empowerment.

¹⁴⁵ Bauer G, Gender and participation of Africa's electoral regimes: An analysis of variation in the gender gap.

¹⁴⁶ Lovenduski J, Women, public life and democracy: Changing common wealth parliamentary perspectives, 120.



One of the attempts to expand the number of female MPs is through women empowerment processes. This has been done through civic education and affirmative action. To the question as to whether women empowerment could increase women MPs in the National Assembly, majority (66.67%) of the male respondents answered in the affirmative. They were of the view that empowering women in the rural areas would help build their capacity and give them an opportunity to equally compete for seats in the National Assembly. Another factor they thought can help women increase in numbers is education. Education could empower women with skills required to achieve elective positions. The Respondents further stated that knowledge is power and that empowerment would help women understand their rights and agitate for them. Moreover, this would help women overcome the economic and social challenges they face thereby giving them an opportunity to participate in direct elections. This confirms the views of Thabane and Butelezi, who have indicated that educating a woman and opening a way of securing a job will empower them financially and in the long run, their numerical strength will expand in the National Assembly

A section of male respondents (6.67%) were of the contrary opinion and held the view that women empowerment was not a solution to achieving gender parity. These respondents stated that women were already empowered and what they needed was change of their mind-set. They observed that despite the high level of educated women, no financial impact is noted in their political landscape. It appears education does not result into better financial capacity to compete in politics.

On the other hand, female respondents (26.65%) agreed with men on the importance of female empowerment in the rural areas, in terms of increasing women capacity and confidence to participate

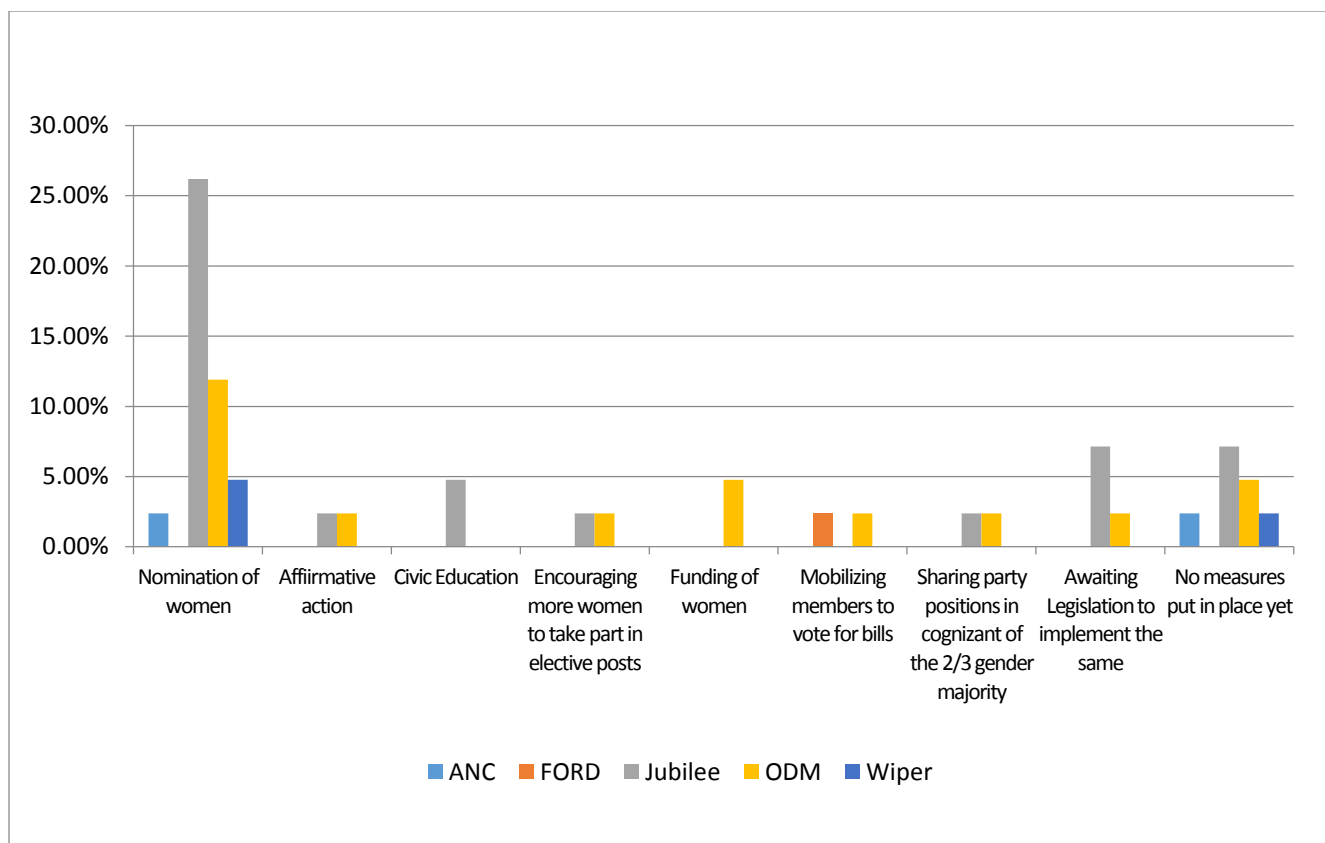
in politics. They stated that it could increase capacity of elected women as well as improve the attitude that women are not able to take leadership roles.

4.5.2. Attempted measures by political parties to implement the two third gender rule.

Table 4.4 Responses on attempted measures by political parties to implement the two third gender rule.

RESPONSES.	ANC	FORD.K	Jubilee	ODM	Wiper	Totals
Nomination of Women.	1		11	5	2	19
No measures put in place yet.	1		3	2	1	7
Affirmative action.			1	1		2
Awaiting legislation to Implement the same			3	1		4
Civic Education			2			2
Encouraging more women to take part in elective posts			1	1		2
Funding of women.				2		2
Mobilising members to vote for bills.		1		1		2
Sharing party positions in cognisance of the gender rule.			1	1		2

Chart 4.4. Responses on attempted measures by political parties to implement the two third gender rule.



As shown by table 4.4 and chart 4.4 majority of male respondents stated that the main contribution political parties had made to realise the two third gender rule was through nominations. These respondents belonged to ANC, Jubilee, ODM and Wiper parties. A section of the respondents, from Jubilee and ODM parties were of the view that political parties have attempted to implement affirmative action by fielding candidates to compete in the reserved seat positions at the county level. Some of the same respondents, from Jubilee party were of the view that parties had tried to implement the gender principle by way of civic education to sensitise citizens on the importance of embracing female political leadership.

A section of the respondents, from Jubilee and ODM parties observed that political parties encouraged women, during public rallies to participate in elections. These same respondents, from ODM party were of the opinion that political parties funded women aspirants. Some respondents from FORD Kenya and ODM parties stated that political parties mobilised their members to support the Constitution of Kenya (Amendment) Bill 2018. The same respondents, from ODM and Jubilee party were of the view that the political parties shared party leadership positions with women in line with

the gender rule while part of the respondents from Jubilee and ODM parties stated that they were waiting for legislation of the relevant laws.

Only a section of the respondents from ANC, Jubilee, ODM and Wiper parties were of a contrary opinion and thought that parties had not come up with sufficient measures to realise the gender rule.

4.5.3. The National Assembly attempted measures to implement the two thirds gender rule: Constitution of Kenya (Amendment) bill 2018.

Realisation of the gender rule has been elusive ever since the Constitution was promulgated in 2010. In 2015, the women movement in consultation with the National Assembly introduced a bill to actualise the gender rule, but was defeated. The second bill was introduced in 2018 and was also defeated. The research embarked on finding out the reasons for the failure of the bills to pass into law. Majority of the male and female respondents combined (51.21%) did not support the bill because it would have put a financial burden on the citizens; it was undemocratic and was being imposed on them. For these same respondents, the proponents of the bill did not appreciate the role of men in passing the bill with some saying that both gender are equal and thus women should compete with men equally. Other respondents were of the view that the bill was biased as it aimed to deal with female issues only. Finally, they observed that the bill was difficult to implement.

A minority of male respondents (24.39%) voted for the bill. The main reasons for doing so included: the bill meant to promote gender balance and that they wanted to ensure that the gender rule was actualised.

Majority of the women respondents (19.51%) voted for the bill as it was their initiative. Moreover they concurred with their male counterparts that it would facilitate the realisation of the gender principle and have more women in the National Assembly. Others voted for it because it mandated the parties to participate in actualisation of the gender rule and guarantee that more representation by women was achieved.

However, some women (4.87%) did not vote for the bill due to various reasons such as being out of the house at the time.

4.5.4. The other causes for the bill's defeat in the National Assembly.

The bill was defeated because majority of the male MPs voted against it. The reasons for voting against it were that: the wage bill would be too expensive for the common citizen, there was lack of goodwill from the male MPs culminating to men either keeping off the house or not voting for the bill.

Some MPs stated that the bill had an intention to discriminate against men as it was a women only affair. They were of the opinion that the superficial support by executive did the bill a blow. Others considered that women MPs were insincere and lacked commitment in their support of the bill while a section of MPs were of the opinion that women would dominate in the house should the gender rule be implemented. While some MPs were of the opinion that the bill did not embrace democracy, others stated that men were not involved from the beginning. Lastly, some MPs also observed that there was lack of commitment and involvement of parties in encouraging their members to support the bill.

4.6. Assessing the relevance of measures adopted by other jurisdictions to Kenyan situation.

The study focused on two main jurisdictions, South Africa and Namibia. The jurisdictions were selected on the basis that they are African countries and they share in a number of socio-cultural characteristics with Kenya. Just like in Kenya, the role of women in both countries was primarily a domestic one. It included taking care of the family and women were not expected to carry out activities outside their homes as it was a preserve of men.¹⁴⁷ Both countries are among the top countries in Africa and the world in achieving a high percentage of women in their National Assemblies. A survey carried out by the Parliamentary Union in February 2019 ranks South Africa as tenth in the world and third in Africa with an average of 42.7% females in the lower House and 35.2% women in the upper House. Namibia is ranked seventh in the world and second in Africa with an average of 46.2% women in the National Assembly. These countries have both embraced voluntary party quotas that have improved the numbers in the National Assembly.

¹⁴⁷ History of Women's struggle in South Africa, South African History Online, 21 March 2011 -< <https://www.sahistory.org.za/article/history-womens-struggle-south-africa> >- accessed on 23 June 2020.

The study did not rely on Rwanda as a comparative study, despite the country attaining more than 50% women representation in their National Assembly, because of the unique history of the country. After the Rwandan Genocide, the population that was left behind was predominantly female, constituting up to 80% of the population. As a result of this, women had to step up and fill the vacant leadership positions and the government helped them significantly.¹⁴⁸ The situation in Kenya is different as women have to advocate for their agenda without strong support from the government.

4.6.1. South Africa.

This is one of the countries that apply gender quotas in their government, specifically voluntary party quotas.¹⁴⁹ These are a type of gender quotas where the political parties willingly put in place procedures that require female representatives to constitute a specific fraction of the list of nominated candidates that represent the political party in elections. The gender quotas were introduced to South Africa in 1994 by the African National Congress (ANC), the most prominent political party. This was as a result of the push by the Women's National Coalition (WNC) that was formed as a united movement for women devoted to advocating for gender mainstreaming in the new legislature.¹⁵⁰ The movement pressed for a pledge from the ANC to guarantee that 30% of the winnable positions on the party lists were occupied by female candidates. The ANC pledged to have the 30% of the seats occupied by women and this was a key achievement for the WNC. As a result of the ANC adopting the voluntary quotas, South Africa is almost realising gender parity, 50-50 representation, in their legislature as well as their executive arms of government. Moreover, several political parties have followed suit and have increased their support for women candidates during elections.

Owing to the advocacy by the women movement, South Africa introduced a proportional representation system as well as a new constitution that greatly advocated for gender parity and has gained repute across the globe.¹⁵¹ Further, the country set up establishments to keep track of the issue

¹⁴⁸ Abouzeid Rania, How women are stepping up to remake Rwanda, National Geographic, 15 October 2019, <<https://www.nationalgeographic.com/culture/2019/10/how-women-are-remaking-rwanda-feature/>> on 23 June 2020.

¹⁴⁹ Viterna J and Fallon K, Democratization, Women's Movements, and Gender-Equitable States, A Framework for Comparison, *American Sociological Review*, 73(4)2008, 674-675.

¹⁵⁰ Waylen, G (2007), 'Women's mobilization and gender outcomes in transitions to democracy: The case of South Africa', 40(5), *Comparative Political Studies*, 521-546.

¹⁵¹ Viterna J and Fallon K, Democratization, Women's Movements, and Gender-Equitable States, A Framework for Comparison, *American Sociological Review*, 73(4)2008, 674-675.

of gender parity such as the South African Commission on Gender Equality. The institutions play an oversight role on all the actions of the government and address all injustices. These efforts have contributed to progressive increase of the number of female politicians. Originally, the increase of the number of women was as a result of the victories by the ANC, however, other parties also followed suit and supported more women candidates during elections and due to a contagion effect. The application of voluntary party quotas notwithstanding, the South African women movement took cognisance of the fact that illiteracy, poverty and marginalisation of women would prejudice the women's right to vote. They also realised that violence and the patriarchal control was a hindrance to women participation in the electoral process.

4.6.2. Namibia.

The Constitution of Namibia bars differential treatment on the basis of sex and also has embraced affirmative action.¹⁵² Further, it affords female candidates with affirmative action processes such as the legislation governing the elections in the country.¹⁵³ The constitution also takes cognisance that women have previously been disadvantaged and need to be cheered on and empowered to actively and effectively participate in all spheres of life in the society.¹⁵⁴ Since independence, the number of female candidates voted into the Namibian legislature has been relatively high. This is credited to a combination of reasons mainly; the application of a proportional representation system that employs a closed list, and voluntary quotas by the political parties. The pressure that was put on the political parties to be more inclusive was one of the key strategies the women in Namibia employed to achieve a high percentage of women in the Namibian legislature.¹⁵⁵

The various strategies employed by the stakeholders to achieve gender parity have propelled Namibia to achieving 46.2% of women forming part of the National Assembly.¹⁵⁶ The women movement¹⁵⁷ has

¹⁵² Article 10 (2), the Constitution of the Republic of Namibia.

¹⁵³ Becker H, New Things after Independence, Gender and Traditional Authorities in Postcolonial Namibia, 32 (1), *Journal of Southern African Studies*, 2006), 32.

¹⁵⁴ Article 23 (3), the Constitution of the Republic of Namibia.

¹⁵⁵ Bauer G, The Hand That Stirs the Pot Can Also Run the Country': Electing Women to Parliament in Namibia, 42 (4) *Journal of Modern African Studies*, 2005,479.

¹⁵⁶ IPU Parline, Monthly ranking of women in national parliaments -<<https://data.ipu.org/women-ranking> >- on 28 February 2020.

¹⁵⁷ Bauer G, The Hand That Stirs the Pot Can Also Run the Country': Electing Women to Parliament in Namibia, *Journal of Modern African Studies*, 42 (4) 2005,484.

become more proactive in advocating for more political representation. These activities are crucial to ensuring that female candidates are elected and further, that the elected candidates advocate for the interests of women in the society. They have formed lobby groups and changed their strategy from addressing the political participation of women as a gender issue, to demanding for a restructuring of politics among the electorate, political parties as well as government officials for the purpose of changing how politics in the country operates.¹⁵⁸

Namibia has applied various other strategies to steer forward gender parity. One of these strategies is having a dialogue with political parties. This has created a stage for the political parties to rethink and create consensus around the issue of gender parity in line with their constitution.¹⁵⁹ The discussion highlighted the importance of political parties in realising gender parity and ensuring that the same is reflected in the establishments of the state as well as its processes.

Namibia has also paid special attention to empowering the women in the society as a way to realise gender equality. The country is committed to empowering the women in the society as well as guaranteeing that their rights are safeguarded in every sector. The country has taken great strides to ensure that the women can be able to access good education, good health services and job opportunities.

¹⁶⁰

4.6.3. Comparative Analysis

The two jurisdictions have embraced voluntary party gender quotas. This type of gender quotas focuses on achieving a certain number of elected women by a particular party. The political parties set this goals on their own and put measures in place to realise them. It is only the political parties that have the power and ability to enforce the quotas. There are no laws in place to pressure the parties into using the voluntary party quotas. However, because the voluntary quotas originate from the decision of the

¹⁵⁸ Geisler G, A Second Liberation': Lobbying for Women's Political Representation in Zambia, Botswana and Namibia, 32(1), *Journal of Southern African Studies*, 2006, 84.

¹⁵⁹ UN Women, Namibia aims for equal access to services, roles for women as agents of peace -< <https://www.unwomen.org/en/get-involved/step-it-up/commitments/namibia> >- on 28 February 2020.

¹⁶⁰ Institute for Democracy and Electoral Assistance, Enhancing intra-party gender parity in Namibia -< <https://www.idea.int/news-media/events/enhancing-intra-party-gender-parity-namibia> >- on 28 February 2020.

party, the quotas are treated as though they were law and consequently are effective.¹⁶¹ This system gives more women opportunity to be elected since the parties support them.

Voluntary quotas are introduced by the political parties and then internal processes are established for enforcing the quotas. This is different from the gender quotas that are legislated where every political party is required to implement them. The internal procedure may focus on restructuring the party, increasing female membership, the manner in which elections in the party are conducted and the ethical rules of the members of the party towards including minorities and women at all levels in the party.¹⁶² Political parties in Kenya would learn from the strategies from South Africa and Namibia in that they can enlist women in their parties' right from the sub locations which is the smallest administrative unit. This can be done with a view to giving women more opportunity to join the parties as members and climb the radar of leadership based on their active involvement in party activities. However, this will still have a limitation in that it can leave outside women who do not sign up political party membership.

Likewise, women in the two countries have engaged political parties and managed to receive more support. This is relevant to the Kenyan context where women are more focused on strategies such as reserved seats and direct nominations. They can learn from their counterparts and engage political parties more with a view to achieving more political space in the parties. This can be achieved only when women will vie and take up party leadership positions. In this way, women can be able to initiate strategies to sensitise women on gender parity and the need to elect women to the National Assembly.

The Women movement in these countries are more vibrant and have taken lobbying to a higher level. In doing this they have engaged various institutions that can help drive their agenda forward. This is a learning experience to be considered by women in Kenya. For instance, women can consider lobbying male parliamentarians to support the law to actualise the two thirds gender rule.

4.7. Conclusion.

The data collected during the field work was interpreted and analysed and facilitated the findings of the study. The target population comprising of MPs gave insight to the rationale of why the gender

¹⁶¹ -< <http://aceproject.org/ace-en/topics/pc/pcb/pcb02/default> >- accessed 23 June 2020.

¹⁶² <http://aceproject.org/ace-en/topics/pc/pcb/pcb02/default> >- accessed 23 June 2020.

principle had not been legislated. Many male respondents indicated that an expanded number of MPs to accommodate more women was unsustainable due to economic constraints. They gave various views on what needs to be done to actualise the gender rule. They underscored the central role of parties and the government of the day in the actualisation of the gender principle. It was evident that more women involvement in gender issues is vital in actualisation of the gender rule. The empowerment of women was said to be a contributing factor to the process of realising the gender principle. The study found that women required the support of other stakeholders including NGOs, the IEBC and men for the actualisation of the gender principle. This was echoed by the experiences of South Africa and Namibia.



5.0. CHAPTER 5: SUMMARY, CONCLUSIONS AND RECOMMENDATIONS.

5.0. Summary of the study.

The study has examined measures that could enable the gender rule to be realised and still be compatible with the principle of universal suffrage as a component of democracy. The study relied on both primary and secondary sources to achieve its objectives and applied both qualitative and quantitative methods to collect data from a target population of both gender in the National Assembly. Structured questionnaires were used as a tool to collect the data which was analysed and information duly recorded. The theoretical framework used consisted of the critical mass theory, substantive equality theory and the substantive and descriptive approaches in analysing the goal of achieving the gender rule.

The literature focused on the dilemma posed by the implementation of the gender rule in article 27(8) of the Constitution and investigated the main difficulties in achieving the constitutional threshold. The study established that there are competing constitutional provisions. This was in the sense that, whereas article 27(8) advocates for the realisation of the gender rule, for instance through direct nominations to the National Assembly, article 38(2) confers Kenyans the right to elect their representatives under universal suffrage. Consequently, while article 27(8) envisages the gender principle, article 38(2) makes it difficult for the results of an election to be predetermined in terms of gender balance.

5.1. Findings.

The study was steered by three main research questions which are discussed below.

5.1.1. Analysis of the measures in place and those attempted to implement Article 27(8) of the Constitution of Kenya in the context of National Assembly.

It was established that the women in Kenya were central in championing for the inclusion of the gender principle in the Constitution. The international community was a key motivator for the women movement as they advocated for affirmative action as a way to have more women in the legislature. The study established that there are several affirmative action measures that promote gender parity, mainly; Reserved seat quotas and direct nominations.

Under article 97(1) (b), the Constitution sets aside 47 seats for women at the National Assembly from each county. In this context, the women compete among themselves. This measure took into account substantive gender equality in the National Assembly as 47 women were guaranteed positions in the House. The study further established that as much as reserved seats had led to the increase of women MPs, the issues facing women have not been adequately addressed. This was because the roles and responsibilities of those holding the reserved seats are not clearly defined which create a perception that they have a limited role to play leading to lax. Another reason is that those already given the opportunity have not done much to prove effective representation of their county.

Moreover, the Constitution at article 100 (b) provides for direct nominations as a measure to realise the gender rule. The nominations are done at the party level on the basis of the strength of numbers in the National Assembly. The study found that nominations were not the right way to bridge the gender gap in the National Assembly. This was because only a few women could be nominated as per the Constitution, and through this path, it could be difficult to meet the demand of the gender rule. The study came to the conclusion that the existing measures were not adequate to realise the gender rule.

The study also sought to assess the measures attempted to realise the gender rule. As highlighted above, the measures in place were not enough to ensure the enactment of the gender principle. The main attempts were through court decision and the National Assembly. Various groups moved to the court to obtain orders to induce the National Assembly, the Attorney General and the Independent Electoral and Boundaries Commission (IEBC) to draft and pass laws that would ensure the gender rule was achieved. Although this did not materialise, it brought to the fore the need to pass a law to realise the gender rule. The National Assembly was mandated with the responsibility to draft legislation that would help in the realisation of the gender rule but they are yet to pass legislation to that effect. In 2015, the first bill was presented to the National Assembly but was defeated and later introduced as the Constitution of Kenya (Amendment) Bill, 2018.

The study found that majority of the male MPs did not support the bill for various reasons, for instance, they were left out of the drafting stage of the bill and there was poor lobbying by both the women in the National Assembly and the political parties. Moreover, according to the male MPs, representatives elected to parliament should champion for the interests of all people, male and female alike. This means that women should advocate for positions where they can represent all people. This is in line with the

principle of universality where citizens form one undivided entity and, dividing people into various classes could be impediment to the unity of the state.¹⁶³

This further underscored the substantive approach to representation where leaders represent the people and not specific sections of the community. It was also established that the defeated bill was putting an economic burden on the citizens as it aimed to increase the number of representatives in the legislature. There are complaints that there is overrepresentation in the National Assembly and there should be a move to decrease the seats and not to have more. Despite its failure, the bill elicited a conversation around the gender rule and more people became enlightened about women representation in Kenya.

5.1.2. The compatibility of the existing measures with the principle of universal suffrage as part of democracy.

The study sought to investigate whether the existing measures were compatible with the principle of universal suffrage by which Kenyans elect leaders to political office. The principle of universal suffrage affords every person the right to vote for their representatives and each vote is equal. The reserved seat gender quotas were found to be in conformity with universal suffrage as the citizens were given the opportunity to elect the women leaders they wanted from a list of candidates.

However, the study confirmed that direct nominations are not in conformity with universal suffrage. The nomination process is run by the political parties who set the processes by which they would select the candidates. The study showed that direct nominations would infringe on the rights of the voters, therefore, their right to universal suffrage. It was also realised that the nomination process is susceptible to bias and favouritism and, in many instances, was not based on merit. This is in agreement with Andrews' sentiments that, affirmative action does not work on merit,¹⁶⁴ and as Bauer puts it, any favouritism of a particular gender is a recipe for mistrust and discontent in the constituency and among the male candidates.¹⁶⁵ This view also concurs with Lovenduski, Campbell and Jacinta's argument that by favouring one group over another, the spirit of "rights for all people" is undermined.¹⁶⁶ However,

¹⁶³ Leyenaar M, Political empowerment of women in Netherlands and other countries, 231.

¹⁶⁴ Andrews P, Affirmative action in South Africa, Transformation or Tokenism; Law in context, 15(2),1999, 93.

¹⁶⁵ Bauer G, Gender and participation of Africa's electoral regimes: An analysis of variation in the gender gap.

¹⁶⁶ Lovenduski J et al, Women public life and democracy, 49-50.

it was found that if done on a small scale, it would be an adequate affirmative action measure taking into account the equality of all marginalised groups. Direct nominations are therefore, to some extent, an avenue to achieve substantive equality in the National Assembly as the views of minority and marginalised groups are represented.

5.1.3. Measures adopted by South Africa and Namibia that are relevant to the Kenyan situation.

The last objective sought to investigate the measures that other jurisdictions had adopted that are relevant to the Kenyan situation. The study focused on two jurisdictions that are relevant to Kenya; Namibia and South Africa. The two countries have a high percentage of women in their National Assemblies as a result of continuous voter sensitisation and lobbying of political parties to make policies favourable to women. Likewise, women in the two countries have been very proactive in party activities. This has earned them the support of the big political parties who have helped to drive their agenda forward. This is relevant to the Kenyan women because the continuous sensitising of voters and lobbying parties could motivate parties to make policies favourable to women. This will improve their chances of attracting party support in passing the relevant legislation. Additionally, women can borrow a leaf from the women in the two countries and not only join the parties but also be very active in party activities so that they can attract their support.

Parties in Kenya could also adopt the voluntary party gender quotas which has worked well in the two countries. While addressing the issue of gender parity, the women and political parties have taken into account the importance of the principle of universal suffrage. The voluntary party gender quotas have been complemented with a lot of civic education to several groups in the society. This can also be explored by the Kenyan women.

5.2. Hypotheses.

The study sought to test two main hypotheses. The first was that the realisation of the two thirds gender rule determines the implementation of gender parity in women representation in the National Assembly. In this context, majority of the MPs were of the view that if parties support more women, gender parity will be achieved since there will be numerical strength of women in the National

Assembly. Likewise, the majority of the women MPs and a considerable number of male MPs were in a consensus that, the Constitution (Amendment) Bill, 2018 if passed, would result in the realisation of the gender rule hence could see the percentage of women rise in the legislature. The comparative analysis also established that gender parity can be achieved if more effort is directed to certain potential areas discussed above. This hypothesis was therefore confirmed to be accurate.

The second hypothesis that was tested was that the implementation of the two thirds gender rule leads to the attainment of greater substantive equality in the National Assembly. The study established that reserved seat gender quotas have attempted to achieve substantive equality but have fallen short of achieving it. However, the study found that women empowerment could create more opportunities for women to access political leadership hence equality of results. Women MPs confirmed that they are capable of achieving gender parity but only if they are provided with a level playing ground with men such as eradication of violence and blackmail during campaigns and access to funding. It is therefore true that the implementation of the gender principle will facilitate greater substantive equality.

5.3. Conclusion

In conclusion, the study managed to highlight the dilemma that exists between the principle of universal suffrage and the realisation of the gender rule, both protected by the Kenyan Constitution. The study discussed the principle of universal suffrage and underscored its main pillars as one vote per an adult and that each vote was of equal weight. In discussing this, the study emphasised the fact that universal suffrage is a supporting value for the sovereignty of the Kenyan people. The study also concluded that it is through voting for their representatives, that the Kenyan people are able to exercise their power and therefore, it is a right that must be guarded safely.

It was further identified that the gender rule was established by the Kenyan Constitution as an attempt to achieve equality in the government but the main emphasis of this research was the National Assembly. The study described the history of the gender rule in Kenya and noted that it was as a result of the efforts of not only women in Kenya, but also several human rights groups as well as the international bodies such as the United Nations and the African Union. The dilemma between the two competing rights was brought out in the process of actualising the gender rule in the country. In this regard, when citizens are electing their representatives at the constituency level, they select one

candidate from a list of other competing candidates for various reasons. However, when the elected MPs come together to form the National Assembly, their composition is required to be in line with the gender rule, which has not been attained so far. The study sought out to establish how the two rights could be reconciled.

The study explained the principle of critical mass of about 30% for the reason that a critical mass of women in parliament can cause influence in legislation. It was established that at times an active smaller critical mass can still have impact in the group. The study also explained the principle of substantive equality as it is one of the core values supporting the gender rule. Substantive equality focuses on achieving equality by providing equality of opportunity in order to achieve equality of results. The equality of opportunity is achieved when individuals who were previously disadvantaged are given more consideration in order for them to be at the same starting point. Once this is achieved, there can be equality of results. The study discussed some of the measures that are already in place as well as the attempts to achieve the gender rule and thus promote substantive equality.

The study mainly identified reserved gender quotas and direct nominations as the measures established to escalate the number of women in the National Assembly. However, it was noted that the measures in place are not enough to ensure the gender rule is actualised. It was found that despite the Constitutional mandate in place requiring the National Assembly to pass legislation, none has been passed to date. The study conducted among MPs shed light on some of the factors that require to be addressed for the necessary laws to be passed in parliament such as; need for more lobbying by women and more support by political parties.

The study identified two countries that had achieved high percentage of women in the National Assemblies, namely South Africa and Namibia. The study found that both countries had adopted voluntary party quotas which embodied gender parity and the principle of universal suffrage. Voluntary party quotas were identified by the study as one of the main answers to the dilemma in the study. However, it was also noted that the voluntary party quotas had to be supported by other measures such as civic education and lobbying relevant groups to support the gender rule.

In conclusion, it is clear that to achieve the two thirds gender rule is a tall order. It cannot be achieved by one approach or method. It also cannot be achieved by one group of the population such as women. It can however, be realised through concerted efforts of various groups such as the central government, parliament, women movement, political parties, Human rights groups, communities and other stakeholders. Since resources and exposure seem to be a challenge for the women, deliberate processes need to be employed to assist women achieve gender parity. For this to succeed, the women movement has to lead from the front by mobilising both women and men to support this course.

5.4. Recommendations.

From the study, it is clear that rather than focus on gender quotas and reserved seats alone to increase women in the National Assembly, stakeholders in Kenya should focus on eradicating the fundamental obstacles faced by women involved in political life.¹⁶⁷ The study confirmed that the main obstacles pertain to lack of financing, violence and blackmail which makes campaigns unfavourable to them. Additionally, the entire election system, lack of structured women empowerment systems and the cultural attitudes towards women leadership are still against them. In Kenya, and many countries in Africa, campaigning is becoming an expensive matter and is restrictive to many political contenders irrespective of gender. Despite this, it is evident that women are greatly affected in comparison to their male counterparts. For instance, in 2008 a survey carried out among 292 MPs across the globe by the Inter-Parliamentary Union discovered that female MPs perceived the lack of financial resources as a major restriction to joining political life than their male counterparts did.¹⁶⁸ It is upon this backdrop that this study recommends the following:

5.4.1. Voluntary party quotas.

Kenya already has two main measures in place to realise the gender rule. However, these have not realised it and thus the recommendation of voluntary party quotas. The voluntary party quotas have been used in South Africa and Namibia, and have had great results in both countries. This recommendation requires that women actively participate in party activities. The women in both

¹⁶⁷ Slaughter A, Binda F, How do we get more women in politics? World Economic Forum, 28 September 2018 -< <https://www.weforum.org/agenda/2018/09/closing-the-political-gender-gap> >- on 22 February 2020.

¹⁶⁸ Slaughter A, Binda F, How do we get more women in politics? World Economic Forum, 28 September 2018 -< <https://www.weforum.org/agenda/2018/09/closing-the-political-gender-gap> >- on 22 February 2020.

countries advocated for their rights in the parties, and, as a result, the parties implemented the voluntary party quotas to ensure more women participated in politics. In South Africa, the ANC used the voluntary quotas to ensure that at least 30% of the elected MPs were women. Consequently, not only was there increased women representation in the National Assembly but it also influenced other political parties to follow suit. This came about as an achievement of the consistent and persistent advocacy in the parties by the women in South Africa. More discussions are needed in Kenya to encourage women to join and be active in political parties. Parties should also be encouraged to adopt these measures in their Constitutions.

5.4.2. Strengthening the women Movement in Kenya.

The women movement in South Africa focused their energies on mobilising political parties, particularly ANC, to make provision for women in their party, and ensure that at least 30% of the elected members of the party were women. The women movement in Namibia has played a crucial role in mobilising key stakeholders to ensure that their efforts were realised and consequently, they managed to achieve gender equity. The women movement in Kenya could embrace this trend and work together to mobilise the political parties to support more women to join the parties and politics in general. Moreover, there needs to be more inclusion of every member of the society towards realising more women participation in politics. To achieve this, the country requires a strong, coordinated women association that could ease the lack of party efficiency in enhancing women's political involvement.¹⁶⁹ The movement will be tasked to address and push for the increase of women in politics. In this regard, there should be no discrimination against any group of women whether they are educated, employed or not. This movement should be able to carry out adequate civic education among women on their rights and responsibilities relative to electing adequate representation in the National Assembly.

5.4.3. Targeted support by Political Parties.

The parties can initiate candidate preparation which should include: training, mentoring, and support of women identified with potential and desire to run for positions in the National Assembly. In doing

¹⁶⁹ Shames S, Barriers and Solutions to Increasing Women's Political Power, - https://scholars.org/sites/scholars/files/shauna_shames_-_barriers_and_solutions.pdf - on 22/02/2020.

this, parties can set goals for women to take part in party organised events and share skills with other parties across counties. They have a responsibility of providing training to women candidates in such skills as fundraising, message development, media relations, campaign management and communicating with voters which are vital in campaigns. They should also ensure women's prominence in the campaign by providing media interaction and experience to encourage other women that are not confident that women have the capacity to lead.



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APPENDICES

APPENDIX I

QUESTIONNAIRE (MALE MEMBERS OF THE NATIONAL ASSEMBLY)

SECTION A: PERSONAL INFORMATION (Please tick (✓) appropriately).

1. What age bracket do you belong to?

20 – 35 [] 36 - 50 [] 51 - 60 [] 61 and above []

2. What is your marital status?

Separated [] Married [] Widow(er) [] Divorced []

3. What is the highest educational level that you have attained?

Diploma [] Graduate [] Post Graduate []

4. By which process did you get to Parliament?

Election [] Nomination []

5. Which Political Party are you affiliated to?

Jubilee [] ODM [] Wiper [] ANC [] others []

If other specify.....

6. Which position do you occupy in your Political Party?

Chairman [] Vice Chairman [] Secretary General [] Coordinator [] Member [] Other [] **If other**

specify.....

SECTION B: CONSTITUTIONAL MEASURES IN PLACE TO REALISE THE TWO THIRDS GENDER RULE.

7. Please state the measures your Political Party has put in place to realize the two thirds gender rule.

.....

8. In your opinion would the two thirds gender rule be implemented through direct elections?

Yes [] No []

Give reasons for your above answer.

.....

9. Do you think that direct nominations are likely to undermine the role of the citizens in choosing women as members of the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....

10. Are the twelve (12) slots for direct nominations reserved for marginalised groups fairly shared among these groups?

Yes [] No []

11. Do you think that women empowerment in rural Kenya through education and economic activities can lead to the increase of women in the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....

12. Do you think reserved seats will result in better representation of community interests especially for women?

Yes [] No []

Give reasons for your above answer.

.....

SECTION C: ATTEMPTED MEASURES TO REALISE THE TWO THIRDS GENDER RULE.

13. Did you vote for the Constitution of Kenya (Amendment) Bill, 2018 regarding the two thirds gender rule?

Yes [] No []

Give reasons for your above answer.

.....

14. In your opinion, why was the Constitution of Kenya (Amendment) Bill, 2018 defeated?

.....

15. Do you think that Political Parties play any role in increasing the number of women in the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....

16. In your opinion, should Political Parties be compelled to support more women at the primary party nominations in order to achieve the two thirds gender rule?

Yes [] No []

Give reasons for your above answer.

.....

17. Do you think compelling Political Parties to increase the number of women in their nomination lists will negatively affect the level playing ground for men and women in the elections to the National Assembly?

Yes [] No []

18. Do you think compelling Political Parties to have more women in their candidature lists will limit the right of the electorate to choose their leaders during party primaries?

Yes [] No []

19. In your opinion, should Political Parties be encouraged to voluntarily support more women candidates as opposed to being compelled?

Yes [] No []

20. Do you think any Political Party has achieved the two thirds gender rule in the National Assembly?

Yes [] No []

21. Do you think that Political Parties that provide for gender parity in their Constitution should be rewarded?

Yes [] No []

22. In your opinion, will rewarding Political Parties which provide for gender parity in their Constitution encourage more Political Parties to do the same?

Yes [] No []

23. What was your main source of funding for your election campaign?

On a scale of 1-4, tick appropriately on the level of contribution towards your campaign funding where:

1. No extent [] 2. Small extent [] 3. Moderately [] 4. Great extent []

	1	2	3	4
Personal income				
Relatives				
Party				
Other (specify)				

APPENDIX II

QUESTIONNAIRE (ELECTED FEMALE MEMBERS OF THE NATIONAL ASSEMBLY).

SECTION A: PERSONAL INFORMATION (Please tick (✓) appropriately).

1. What age bracket do you belong to?

20 – 35 [] 36 - 50 [] 51 - 60 [] 61 and above []

2. What is your marital status?

Separated [] Married [] Widow(er) [] Divorced []

3. What is the highest educational level that you have attained?

Diploma [] Graduate [] Post Graduate []

4. By which process did you get to the National Assembly?

Election [] Nomination []

5. Which Political Party are you affiliated to?

Jubilee [] ODM [] Wiper [] ANC [] Others []

If other specify.....

6. Which position do you occupy in your Political Party?

Chairman [] Vice Chairman [] Secretary General [] Coordinator [] Member [] Other [] **If other**
specify.....

SECTION B: CONSTITUTIONAL MEASURES IN PLACE TO REALISE THE TWO THIRDS GENDER RULE.

7. In your opinion, is direct nominations the right way to bridge the gender gap in the National Assembly?

Yes [] No []

Give reasons for your answer above.

.....

8. Do you think that the two thirds gender rule can be implemented through direct elections?

Yes [] No []

Give reasons for your above answer

.....

9. In your opinion, what are the main challenges that hinder women candidates from attaining the one third gender representation in the National Assembly?

.....

10. Do you think that direct nominations are likely to undermine the role of the citizens in choosing women as members of the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....
11. Are the twelve (12) slots for direct nominations reserved for marginalised groups fairly shared among these groups?

Yes [] No []

12. Do you think that women empowerment in rural Kenya through education and economic activities can lead to the increase of women in the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....
13. Do you think that direct nominations will result in better representation of community interests especially for women?

Yes [] No []

Give reasons for your answer above.

.....
SECTION C: ATTEMPTED MEASURES TO IMPLEMENT THE TWO THIRDS GENDER RULE.

14. Did you vote for the Constitutional (Amendment) Bill, 2018 regarding the two thirds gender rule?

Yes [] No []

Give reasons for your above answer.

.....
15. Do you think that Political Parties play any role in increasing the number of women in the National Assembly?

Yes [] No []

Give a reason for your above answer.

.....

16. In your opinion, should Political Parties be compelled to support more women at the primary party nominations to achieve the two thirds gender rule?

Yes [] No []

17. Do you think compelling Political Parties to increase the number of women in their candidature lists will negatively affect the level playing ground for candidates in the election to the National Assembly?

Yes [] No []

18. Do you think compelling Political Parties to have more women in their candidature lists will limit the right of the electorate to choose their leaders during party primaries?

Yes [] No []

19. In your opinion, should Political Parties be encouraged to voluntarily support more women candidates as opposed to being compelled?

Yes [] No []

20. Do you think that Political Parties that provide for gender parity in their Constitution should be rewarded?

Yes [] No []

21. From the perspective of the two thirds gender rule, do you think there is any chance for independent candidates to be elected?

Yes [] No []

22. What was your main source of funding for your election campaign?

On a scale of 1-4, tick appropriately on the level of contribution towards your campaign funding where:

	1	2	3	4
Personal income				
Relatives				
Party				
Other (specify)				



APPENDIX III

QUESTIONNAIRE (NOMINATED FEMALE MEMBERS OF THE NATIONAL ASSEMBLY)

SECTION A: PERSONAL INFORMATION (Please tick (✓) appropriately)

1. What age bracket do you belong to?

20 – 35 [] 36 - 50 [] 51 - 60 [] 61 and above []

2. What is your marital status?

Separated [] Married [] Widow(er) [] Divorced []

3. What is the highest educational level that you have attained?

Diploma [] Graduate [] Post Graduate []

4. Which Political Party are you affiliated to?

Jubilee [] ODM [] Wiper [] ANC [] others []

If other specify.....

5. Which position do you occupy in your Political Party?

Chairman [] Vice Chairman [] Secretary General [] Coordinator [] Member [] Other [] **If other specify.....**

6. Prior to this nomination to the National Assembly, did you vie for any political seat in the 2017 general elections?

Yes [] No []

7. Have you ever run for any political seat prior to the 2017 general elections?

Yes [] No []

8. Prior to the 2017 general elections, have you ever been a nominated member of the National Assembly?

Yes [] No []

9. Which of the following groups do you represent in the National Assembly?

Women []

Persons with Disabilities []

Youth []

Ethnic and other minorities []

Marginalized Communities []

SECTION B: CONSTITUTIONAL MEASURES IN PLACE TO REALISE THE TWO THIRDS GENDER RULE.

10. Do you think direct nominations is the right way of bridging the gender gap in the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....

11. Do you think that women empowerment in rural Kenya through education and economic activities can lead to the increase of women in the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....

SECTION C: ATTEMPTED MEASURES TO REALISE THE TWO THIRDS GENDER RULE.

12. Would you have wanted to vote for the Constitution (Amendment) Bill, 2018?

Yes [] No []

13. Do you think that Political Parties play any role in increasing the number of women in the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....
14. For purposes of implementation of the two thirds gender rule, would you suggest nominations or direct election?

Yes [] No []

Give reasons for your above answer.

.....
15. Do you intend to vie for any position in the National Assembly?

Yes [] No []

16. From the point of view of implementation of the two thirds gender rule, identify the main challenge(s) faced by women nominated to the National Assembly.

.....
17. On a scale of 1-4, how did the following factors contribute to your nomination as a member of the National assembly?

On a scale of 1-4, tick appropriately on the level of contribution towards your campaign funding where:

1. No extent [] 2. Small extent [] 3. Moderately [] 4. Great extent []

Factors	1	2	3	4
Active and loyal member of the Party				
Good educational qualifications, competence and experience.				
Keen interest in women issues				
Other (specify				



APPENDIX IV

QUESTIONNAIRE (MEMBERS OF THE NATIONAL ASSEMBLY- PARTY LEADERS)

SECTION A: PERSONAL INFORMATION (Please tick (✓) appropriately)

1. What age bracket do you belong to?

20 – 35 [] 36 - 50 [] 51 - 60[] 61 and above[]

2. What is your marital status?

Separated [] Married [] Widow(er) [] Divorced []

3. What is the highest educational level that you have attained?

Diploma [] Graduate [] Post Graduate []

4. Which Political Party are you affiliated to?

Jubilee [] ODM [] Wiper [] ANC [] others []

If other specify.....

5. What is your party position in the National assembly?

Speaker of the National Assembly []

Majority Party Leader []

Minority Party Leader [] Chief Whip []

Others []

If other specify

SECTION B: CONSTITUTIONAL MEASURES IN PLACE TO REALISE THE TWO THIRDS GENDER RULE.

6. In your opinion, do you think direct nominations is the right way to bridge the gender gap in the National Assembly?

Yes [] No []

Give a reason for your above answer.

.....

7. Do you think that direct nominations undermine the role of the citizens in choosing their leaders?

Yes [] No []

8. Are the twelve (12) slots for direct nominations reserved for marginalised groups fairly shared among these groups?

Yes [] No []

9. Do you think that women empowerment in rural Kenya through education and economic activities can lead to the increase of women in the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....

10. In your opinion, will direct nominations and reserved seats result in better representation of community interests especially for women?

Yes [] No []

SECTION C: ATTEMPTED MEASURES TO IMPLEMENTED THE TWO THIRDS GENDER RULE.

11. In your opinion, why was the Constitution (Amendment) Bill, 2018 regarding the two thirds gender rule defeated?

.....

12. In your opinion, was the decision of the members of the National Assembly a reflection of the position of the Political Parties on the matter or a personal decision?

.....

13. Do you think that Political Parties play a key role in increasing the number of women in the National Assembly?

Yes [] No []

Give reasons for your above answer.

.....

14. In your opinion, should Political Parties be compelled to support more women at the primary nominations to achieve the two thirds gender rule?

Yes [] No []

Give reasons for your above answer.

.....

15. Do you think compelling Political Parties to increase the number of women in their nomination lists will negatively affect the level playing ground for men and women in the elections to the National Assembly?

Yes [] No []

16. Do you think compelling Political Parties to have more women in their candidature lists will limit the right of the electorate to choose their leaders during party primaries?

Yes [] No []

17. In your opinion, should Political Parties be encouraged to voluntarily support more women candidates as opposed to being compelled?

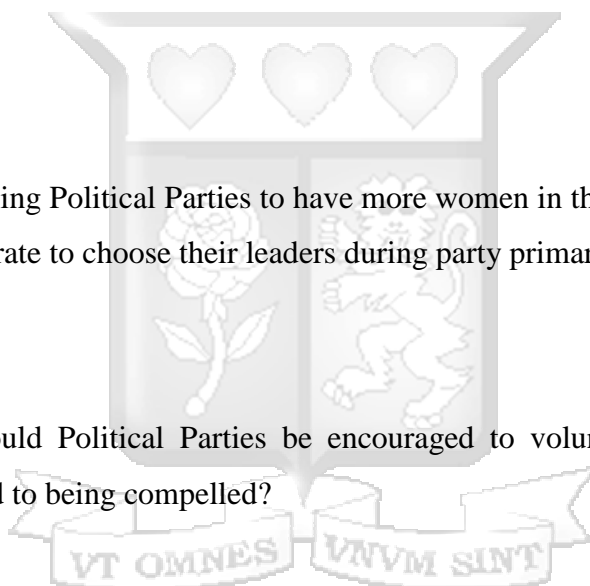
Yes [] No []

18. Do you think any Political Party has achieved the two thirds gender rule in the National Assembly?

Yes [] No []

19. In your opinion, should Political Parties that provide for gender parity in their Constitution be rewarded?

Yes [] No []



20. Do you think that rewarding Political Parties which provide for gender parity in their Constitution will encourage more Political Parties to do the same?

Yes [] No []

21. What was your main source of funding for your election campaign?

On a scale of 1-4, tick appropriately on the level of contribution towards your campaign funding where:

1. No extent [] 2. Small extent [] 3. Moderately [] 4. Great extent []

	1	2	3	4
Personal income				
Relatives				
Party				
Other (specify)				

